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Supreme Court of the United States

STEVEN J. THOROGOOD and MARTIN MURRAY,

Petitioners,

v.

SEARS, ROEBUCK & CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the *Phillips Petroleum Co. v. Shutts*[1] rule (that absent class members of a Rule 23(b)(3) class cannot be bound without first receiving "minimal due process" protections of notice and opportunity to be heard or opt out), coupled with both *Taylor v. Sturgell*'s[2] prohibition on preclusion by "virtual representation", and the pending decision in *Smith v. Bayer*,[3] precludes a court from enjoining never-noticed absent class members of a *decertified* multi-jurisdiction Rule 23(b)(3) class from subsequently pursuing their own distinct state law class claims in their state court of another jurisdiction?

2) After the reversal and decertification of a never-noticed multi-jurisdiction class, and mooting of the named plaintiff's individual claim, whether the Seventh Circuit impermissibly expanded the All Writs Act[4] as a separate and independent basis of jurisdiction to enjoin absent class members nationwide from thereafter pursuing their claims as class claims anywhere?

3) Whether it is a misapplication of the All Writs Act for one federal circuit court of appeals to enjoin absent never-noticed class members from pursuing single state class claims under diversity jurisdiction

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1. 472 U.S. 797 (1985).

2. 553 U.S. 880 (2008).

3. 131 S.Ct. 61 (2010).

4. 28 U.S.C. § 1651(a) (1988).

in another federal circuit, despite the existence of materially different substantive laws and procedural standards that were never explicitly decided by the original court, when other adequate remedies exist and the district court of the other circuit has already rejected a plea of collateral estoppel (an issue raised only hypothetically in *Smith v. Bayer*)?

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Petitioners Steven J. Thorogood and Martin Murray respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit, ordering the district court to enjoin absent class members of a decertified multi-jurisdiction class who never received notice of the case, from pursuing their single state class claims.

OPINIONS BELOW

The United States District Court for the Northern District of Illinois' (Leinenweber, H.) May 18, 2010 Order denying Defendant-Respondent Sears Roebuck & Co.'s Motion For Permanent Injunction under the All Writs Act has not been officially reported but is reproduced in the Appendix at 31a- 35a.

The United States Court of Appeal for the Seventh Circuit's November 2, 2010 decision reversing the district court and denying Thorogood's Motion to Dismiss Appeal for Lack of Subject Matter Jurisdiction is reported at 624 F.3d 842 and reproduced at Appendix 1a-31a.

The denial of Thorogood's Petition for Rehearing, With Suggestion for Rehearing *En Banc*, denied December 2, 2010, is reported at 627 F.3d 289 and reproduced at Appendix 36a-48a.

STATEMENT OF JURISDICTION

The Seventh Circuit entered its opinion and order reversing the district court's denial of a permanent injunction on November 2, 2010. A timely petition for rehearing, with suggestion for rehearing en banc, was

denied on December 2, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part, that "[n]o person shall...be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V.

The All-Writs Act provides, in relevant part, that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (1988).

STATEMENT OF THE CASE

I. Nature of the Case

This petition raises a similar controversy as that presented in the pending case of *Smith v. Bayer*, 131 S.Ct. 61 (2010), but presents the broader issues of whether a federal court in one circuit, after the decertification of a never-noticed multi-jurisdictional class action, may bind, preclude, and enjoin absent class members by either mere "adequate representation" (i.e. without notice and opt-out opportunity) or under the authority of the All Writs Act, 28 U.S.C. § 1651(a) (1988), from subsequently prosecuting similar but distinct single-state class claims under diversity jurisdiction in the class members' home forum and in other federal circuits, especially where the district court in another federal circuit has previously rejected a

plea of collateral estoppel against that plaintiff's pursuit of his claim as a single-state class claim.[1]

II. Proceedings and Disposition Below

A. Thorogood's Original Multi-jurisdiction Case

On March 9, 2006, Plaintiff-Petitioner Steven J. Thorogood ("Thorogood") sued Illinois-headquartered Defendant-Respondent Sears, Roebuck & Co. ("Sears") in Illinois state court, asserting state law consumer protection claims that Sears had misrepresented certain dryer models as having a stainless steel drum, when in fact a portion of the drum was mere coated mild steel (i.e. rustable).[2] Sears removed the case under the federal Class Action Fairness Act, 28 U.S.C. § 1332(d)(5)(B) ("CAFA"), to the United States District Court for the Northern District of Illinois (Judge Leinenweber), which certified the case to proceed under Federal Rule of Civil Procedure 23(b)(3) for a 29-jurisdiction class.[3]

Sears petitioned, under Rule 23(f) (for review of the certification order prior to issuing any notice to class members).[4] The United States Court of Appeals for

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1. *See Murray v. Sears, Roebuck & Co., et al*, No. c-09-5744-cw (N.D.Cal.), *Murray* Docket No. 120 (Sept. 3, 2010 Order Denying Defendants' Motion to Strike Class Allegations).

2. *Thorogood v. Sears*, Roebuck & Co., No. 06 CH 04724 (Ill. Cir. Ct. Mar. 9, 2006).

3. *Thorogood v. Sears, Roebuck* & Co., No. 06 C 1999, 2007 WL 3232491 (N.D. Ill. Nov. 1, 2007).

4. *Thorogood v. Sears, Roebuck & Co.*, No. 06 C 1999, *Thorogood* Dkt. No. 91.

the Seventh Circuit initially denied, but subsequently "reconsidered", by a new panel which granted Sears' appeal, and reversed, in its view that no common issues existed, without reaching any issues of typicality or adequacy of representation, and ordered the class decertified. *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742 (7th Cir. 2008) *cert. denied*, 130 S.Ct. 90 (2009) ("*Thorogood I*"). Thereafter, Thorogood's pursuit of this case as an individual claim was mooted by Sears' Rule 68 offer of judgment, ending subject matter jurisdiction over the claims. *Thorogood v. Sears, Roebuck & Co.*, No. 06 C 1999 (N.D. Ill July 1, 2009), *affd.*, *Thorogood v. Sears, Roebuck & Co.*, 595 F.3d 750 (7th Cir. 2010) ("*Thorogood* II").

B. Murray's Single-State California Case And Sears' Response In The Illinois And California District Courts

On November 5, 2009, Martin Murray ("Murray"), a California resident, filed a similar, but not identical, consumer fraud complaint in California state court, asserting solely California state law claims for himself and for a California-only class of consumers,[5] against both seller Sears and the manufacturer, Electrolux Home Products, Inc. ("Electrolux").[6] Sears removed,

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5. Mr. Murray first contacted attorney Krislov on February 28, 2009, *after* the Seventh Circuit's decertification decision in *Thorogood I*. *See Thorogood* Dkt. No. 167, Exhibit 6. Prior to this time, Murray was not aware of Thorogood's multi-jurisdiction litigation nor in contact with anyone involved in the case.

6. *Murray v. Sears, Roebuck, & Co. et al*, No. 489318 (Cal. Sup. Ct. November 5, 2009).

under CAFA, to the United States District Court for the Northern District of California ("*Murray* Case").[7]

Rather than directly asserting collateral estoppel in the *Murray* Case, Sears moved to stay those proceedings,[8] and returned to the closed *Thorogood* case to file a motion for permanent injunction in the Illinois district court under the All Writs Act, to prohibit all absent, never-noticed class members nationwide from pursing their separate state law claims as class claims.[9] The Illinois district court denied Sears' motion, holding that "Defendant ha[d] not demonstrated a sufficient threat to this Court's judgment such that an injunction is appropriate or necessary" under the All Writs Act.[10]

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7. *Murray v. Sears, Roebuck & Co., et al*, No. c-09-5744-cw (N.D.Cal.).

8. *See Murray*, No. c-09-5744-cw Dkt. No. 87 (May 5, 2010 Minute Entry granting Defendant's Motion to Stay, in part as to discovery, until July 15, 2010).

9. *Thorogood v. Sears, Roebuck & Co.*, No. 06 C 1999, *Thorogood* Dkt. No. 158.

10. *Thorogood v. Sears, Roebuck & Co.*, No. 06 C 1999 (May 18, 2010) at Appendix ("Appx.") 34a (further holding that the exigent circumstances that make the Act's authority "necessary or appropriate" such as "numerous other filings", the need for "sole jurisdiction over settlement", or "ongoing litigation.... which must be protected from parallel litigation in another case" did not exist in *Thorogood* to warrant an injunction).

The California district court then rejected Sears' motion to continue the stay and denied Sears' plea of collateral estoppel, permitting Murray's case to proceed against both Sears and Electrolux.[11]

C. The Appellate History

Sears appealed the Illinois' district court's denial of an injunction to the Seventh Circuit, which then (1) denied Thorogood's motion to dismiss for lack of subject matter jurisdiction, and (2) reversed, ordering the district court to enjoin all other absent former class members nationwide, and their counsel, from pursuing their claims as class claims against Sears anywhere, in any court, including the California class members of *Murray*. *Thorogood v. Sears, Roebuck & Co.*, 627 F.3d 289 (7th Cir. 2010) ("*Thorogood III*"). Appx. 1a-31a.

Thorogood's timely November 16, 2010 Petition For Rehearing With Suggestion For Rehearing *en banc*[12] was subsequently denied on December 2, 2010. *Thorogood v. Sears, Roebuck & Co.*, 627 F.3d 289 (7th Cir.). ("*Thorogood Rehearing Order*").

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11. *Murray*, Dkt. No. 120.

12. *Thorogood*. Case No. 10-2407, Appellate Dkt. No. 39.

REASONS FOR GRANTING THE PETITION

The ongoing conflict in the federal appellate circuits, originally created by *In re Bridgestone/Firestone Inc.*, 333 F.3d 763 (7th Cir. 2003), since expanded by the Eighth Circuit in *In re Baycol Prod. Litig.*, 593 F.3d 716 (8th Cir. 2010), presently pending on certiorari as *Smith v. Bayer*, 131 S.Ct. 61 (2010), and now the Seventh Circuit's *Thorogood III* decision, squarely conflicts with the otherwise unanimous United States Circuit Court adherence[13] to this Court's brightline rule[14] that absent class members cannot be bound without first satisfying minimal due process requirements of notice and the opportunity to be heard or opt out. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974).

Smith, currently before this Court (fully briefed, argued on January 18, 2011, and awaiting decision) presents closely related questions of due process and preclusion in the class action context and may determine whether Thorogood's absent, never-noticed class members may be bound by a pre-notice reversal of certification. Indeed, the Court's determination in *Smith* of whether the Eighth Circuit's "mere adequacy" standard or use of the Anti-Injunction Act[15] can bind the absent class members of *Smith*'s never-noticed nor certified class—in conflict with other circuits' clear rule prohibiting such

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13. *See* Sup. Ct. R. 10(a).

14. *See* Sup. Ct. R. 10(c).

15. 28 U.S.C. § 2283 (1970).

preclusion[16]—will provide substantial clarity for the rights of Thorogood's never-noticed decertified class and Murray's pending class claims, which the Seventh Circuit has ordered enjoined.[17] *Thorogood*, however, goes yet further and provides the vehicle for this Court to broadly declare that *all* absent class members are entitled to both notice and the opportunity to opt out or participate, before being bound *in personam*; and, that neither the Anti-Injunction nor All Writs Acts can circumvent such protections. In conjunction with *Smith*, holding definitively that absent class members cannot be adversely bound in a (b) (3) money damages case by mere "adequate representation" will provide a more comprehensive and predictable standard necessary to halt the unjustified departure from this Court's precedent and eliminate the conflict among the federal circuit courts on this issue.

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16. *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233, 1246 (11th Cir. 2006); *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 134 F.3d 133, 141 (3rd Cir.1998); *see e.g. Tice v. American Airlines, Inc.*, 162 F.3d 966, 972 (7th Cir. 1998); *Richard v. Hoechst Celanese Chemical Group, Inc.*, 355 F.3d 345, 351 (5th Cir. 2003); *In re Telectronics Pacing Systems, Inc.*, 221 F.3d 870, 881 (6th Cir. 2000); *Besinga v. U.S.*, 923 F.2d 133, 135 (9th Cir. 1991); *Brown v. Colegio de Abogados de Puerto Rico*, 613 F.3d 44, 50-1 (1st Cir. 2010); *Stephenson v. Dow Chemical Co.*, 273 F.3d 249, 260-61 (2nd Cir. 2001); *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1314-15 (4th Cir. 1978).

17. *See Thorogood Rehearing Order*, 627 F.3d at 290. Appx. at 39a stating "a circuit split has developed concerning whether and when class certification orders can serve as the basis for collateral estoppel" and highlighting the "tension and the possibility that the merits decision in *Smith v. Bayer*....may warrant modification of the injunction"); and *Thorogood III*, 624 F.3d at 853-54. Appx. at 22a (advising the district court to "make clear that persons subject to [the injunction] will be allowed to obtain modification in light of the...the *Smith* case").

Even if this Court believes that (a) courts can bind absent class members after originally refusing to exercise jurisdiction over them and without first satisfying minimal due process requirements, (b) that the All Writs Act can be used to evade such requirements, or (c) that *Smith* will thoroughly address *those* issues, the Seventh Circuit, in *Thorogood III* below, goes yet further and creates additional circuit splits, by asserting that the All Writs Act provides authority to enjoin absent class members when (1) the single individual judgment on the merits is not threatened, (2) the only issue before the original court was the certification of a multi-jurisdiction class under Tennessee law, (3) the substantive law and application of the certification procedures are distinct, thus creating different *standards* never addressed or applied in the original action, (4) a concurrent federal proceeding, with the availability of appeal or mandamus, served as an adequate remedy at law, and (5) the issue of preclusion was already adequately addressed and rejected by another district court of a different circuit so that an appeal to the original court evades the jurisdiction of the subsequent appellate court.

These issues, only posed as hypotheticals in *Smith*,[18] are now squarely presented and ripe for review in

18. *See Smith v. Bayer*, 131 S.Ct 61 (2010) January 18, 2011 Oral Argument ("*Smith* Oral Argument") at 23:25-24:1-7 (Justice Breyer asking, "did you ever come across an instance where....a different plaintiff went to a different Federal court in a different part of the country and asked for similar certification?"); *id.* at 32:16-20 (Justice Sotomayor asking counsel about the appropriateness of a "blanket injunction...against all future State court class proceedings across the United Staes"); *id.* at 41:17-22 (Justice Sotomayor asking, hypothetically, "how we articulate that rule in a way that doesn't...permit the barring of claims when there is a different standard.").

Thorogood III, and provide the Court with an opportunity to resolve these splits among the circuit courts in their entirety.

I. The Seventh And Eighth Circuits' New Holding, That Absent Class Members Can Be Adversely Bound, In A (b)(3) Money Damages Case, By Mere "Adequate Representation" Without Notice And Opportunity To Opt Out, Violates Both *Phillips Petroleum v. Shutts*[19] Minimum Due Process Requirements And *Taylor v. Sturgell*'s[20] Prohibition On Preclusion By "Virtual Representation", And Splits With The Otherwise Consistent Adherence Of The Other Circuits.

For more than twenty five years since *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the federal circuit courts have unanimously recognized and adhered to this Court's brightline rule that absent class members cannot be bound, neither for issue nor claim preclusion, without first affording them the minimum due process protections of notice and the opportunity to opt out or participate.[21]

In 2003, the Seventh Circuit charted a different course in the case of *In re Bridgestone/Firestone, Inc.*, 333 F.3d 763 (7th Cir. 2003), holding that a circuit court's reversal of nationwide class certification, on a Rule 23(f) petition, is sufficient, by mere adequate representation

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19. 472 U.S. 797 (1985).

20. 553 U.S. 880, (2008).

21. *See supra* fn. 16.

alone, without notice or opportunity to opt out, to preclude absent class members nationwide from bringing their claims as multistate claims; albeit without precluding them from proceeding thereafter in pursuing single-state class claims under state law. *Id.* at 768-69.

More recently, in the case of *In re Baycol Prod. Litig.*, 593 F.3d 716 (8th Cir. 2010), the Eighth Circuit, extended the *Bridgestone* rule, declaring that a district court's denial of class certification in the first instance would also preclude absent class members from pursuing their claims as class claims, *even in state courts*, under the forum state's distinct procedural law, the issues presently before this court in *Smith v. Bayer*, 131 S.Ct. 61 (2010).

The Seventh Circuit's declaration in *Thorogood III*, that absent class members can be enjoined without first affording them *Shutts*' minimum due process of notice and the opportunity to opt out,[22] offends minimum due process requirements and directly conflicts with this Court's array of precedent holding that due process, except in narrowly defined circumstances, demands "one is not bound by a judgment *in personam* in litigation in which he is not designated as a party or to which he has not been made a party by service of process". *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) (denying the *res judicata* effect of the prior judgment in light of the failure to insure the protection and interests of the absent parties who would be bound by it); *see also Taylor v. Sturgell*, 553 U.S. 880, 893 (2008)(rejecting the doctrine of virtual representation to supplant the necessity of personal jurisdiction before binding parties *in personam*); *Richards v. Jefferson*, 517

22. *Thorogood III*, 624 F.3d at 848. Appx. at 11a.

U.S. 793, 798 (1996)(holding that the prior litigation did not bar different parties from pursuing their claims and noting the "deep rooted historic tradition that everyone should have his own day in court"); *Shutts*, 472 U.S. at 808.

In contrast to the Seventh Circuit's determinations, this Court has repeatedly held that in the class action context, the limitations on an absent individual's full and fair opportunity to litigate must be implemented by the procedural safeguards of Rule 23, and that "[a]n expansive doctrine of virtual representation...would authorize preclusion...shorn of the[se] protections". *Taylor*, 553 U.S. at 900-01. *See also* 5 Hebert B. Newberg & Alba Conte, *Newberg on Class Actions* § 16:21, at 235 (4th ed. 2002)("In a class action context, the ability to bind absent class members depends on compliance with Rule 23 and due process.").

In *Shutts*, the Court declared the simple rule that, for a (b)(3) class, minimum due process (in order to exert the court's jurisdiction and bind absent class members) requires notice and opportunity to opt out:

> If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel.

472 U.S. at 811-812. Subsequently, citing *Shutts* in addressing the *res judicata* effect of a prior judgment, this Court explained in *Richards* that in the class preclusion

context, these minimal "guarantee[s] of due process ha[ve] little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." 517 U.S. at 799. *See also* 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Fed. Prac. & Proc. Juris.* § 4455, at 458 (2d.ed. 2002) ("Preclusion by class-action representation is subject to a variety of limitations in addition to the common requirements of ordinary preclusion doctrine. The most obvious limitation is that there *must actually have been a class action*... Failure to provide notice required by due process or court rule will defeat preclusion....") (emphasis added).

Until recently, adherence to this brightline rule by the federal circuits has been unwaveringly followed.[23] The Seventh and Eighth Circuits' new tack—that absent class members can be bound, issue precluded, on "mere adequacy" and without notice—contradicts this long standing recognition that, before being bound by anything, *every* absent class member is entitled to minimal due process protections of notice and the opportunity to opt out. *Shutts*, 427 U.S. at 811-812.

Not only do the other federal circuits agree that the "mere adequacy alone" standard is insufficient to bind absent class members, the clear requirement of "notice and the opportunity to opt out" is sufficiently entrenched to be declared "critical" in the Manual for Complex Litigation, Fourth Edition:

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23. See *supra* fn. 16.

> Notice is a critical part of class action practice. It provides the structural assurance of fairness that permits representative parties to bind absent class members. In a Rule 23 (b)(3) class, notice conveys the information absent class members need to decide whether to opt out and the opportunity to do so. In all class actions, notice provides an opportunity for class members to participate in the litigation, to monitor the performance of class representatives and class counsel, and to ensure that the predictions of adequate representation made at the time of certification are fulfilled.

MANUAL FOR COMPLEX LITIGATION, (Fourth) §21:31 at 285. Further, the "mere adequacy" standard conflates the constitutional requirements mandated by this Court and ignores the indispensable prerequisites needed to bind absent class members. *See Eisen*, 417 U.S. at 176-77 (denouncing "petitioner['s contention] that adequate representation, rather than notice, is the touchstone of due process in a class action and therefore satisfies Rule 23...Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided.").

Directly relying on these principles, the Third and Eleventh Circuit specifically refuse to allow the All Writs Act[24] to create an independent basis of jurisdiction to enjoin individuals not before the court or subject to its jurisdiction after the denial of certification. *See In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 134 F.3d 133, 141 (3rd

24. 28 U.S.C. § 1651(a) (1988).

Cir. 1998)(refusing to enjoin absent class members under the All Writs Act without first satisfying minimum due process requirements); *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233, 1246 (11th Cir. 2006)(holding that "the denial of class certification limited the court's in personam jurisdiction solely to the parties appearing before it") (discussed *infra* at Section II).

Shutts' notice–plus–opportunity standard for preclusion is also recognized by a number of state courts as constitutionally required. The New Mexico Supreme Court held that a previous denial of class certification does not preclude absent class members from subsequently seeking certification, because absent class members are not the same party for purposes of pre-certification decisions and have not been privy to due process protections:

> To allow the plaintiffs to be bound by the denial of class certification before a properly conducted class action has even begun would expand the application of virtual representation beyond what the Supreme Court intended and beyond the point where we are willing to apply preclusive effect. Accordingly, we hold that virtual representation should be limited to apply to absent class members only in situations where the class has been properly certified and conducted....[I]t does not apply to pre-certification decisions, including denial of class certification.

Ideal v. Burlington Resources Oil & Gas Co. LP, 233 P.3d 362, 366-67 (N. Mex. S. Ct. 2010). As the court further declared, class preclusion, absent certification (and thus

based on nothing more than personal jurisdiction over a single individual), is more than just unconstitutional, it is "fundamentally unfair." *Id.* at 367-68; *see also* 18A Wright & Miller, § 4455, at 458 ("Lack of notice may also defeat preclusion on more general theories of fairness").

Similarly, the California Court of Appeals recognizes that a "properly conducted class action" does not exist without first satisfying the requirements of Rule 23:

> The protections for absent class members prescribed by rule 23, of course, are afforded after a motion for class certification has been granted, not by the filing of a motion for certification that is denied. Similarly, the concept of a "properly conducted class action" suggests a class action that has been certified, following a hearing in which the named representatives have established they satisfy the requirements of rule 23, and then litigated to judgment or settled, not an individual lawsuit in which a motion for class certification was denied. Literally (and narrowly) read, therefore, *Taylor v. Sturgell*, ... would appear to preclude the use of collateral estoppel to bar absent putative class members from seeking class certification following the denial of a certification motion in an earlier lawsuit.

Johnson v. GlaxoSmithKline, Inc., 83 Cal.Rptr.3d 607, 619 (Ct.App. 2 Dist. 2008).

The Seventh Circuit's asserted reliance on *Taylor's* recognition of the "limited circumstances"[25] in which non-party claim preclusion may apply,[26] does not support the "mere adequacy" standard. *Taylor*'s explanation that absent class members of a "properly conducted class action" could be exceptions to the general rule that every person is entitled to his own day in court, *Taylor*, 553 U.S at 894, rests on the protections (notice, opportunity to opt out and adequacy) that come from the class actually being certified—by definition, a *properly conducted* class action requires the satisfaction of minimum due process protections that never existed here. *See* 18A Wright & Miller, § 4455, at FN 27 ("It is difficult to understand the nature of a preclusion-by-representation doctrine that would bind a class by litigation in which a court had expressly refused to certify a class. There is no indication that any of the protections of notice or opportunity to opt out were afforded the plaintiffs.").

The Seventh and Eighth Circuits' "mere adequacy" rule also fails to recognize three other important bricks in *Shutts*' minimum due process standard of notice and opportunity to opt out plus adequate representation throughout. First, the decision to certify, *vel non*, is indeed the decision whether to exercise jurisdiction over absent class members' claims; denial being a decision to only decide claims of the named parties.[27] Second,

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25. *Taylor*, 553 U.S. at 894.

26. *Thorogood*, 624 F.3d at 852. Appx. at 11a.

27. *See e.g. Shlahtichman v. 1-800 Contacts, Inc.*, Case No. 09-4073, 2010 WL 3122786, *3 (7th Cir. Aug. 10, 2010) ("Consistent with the fact that no class was certified, we shall treat [plaintiff's] complaint as if it were filed solely on his own behalf."); *Aguilera v.*

certification is not purely a pro-plaintiff tool. Rather, the drafters of Rule 23 crafted it as a roadmap for defendants to obtain global preclusion for a decision on the merits.[28] Third, the "notice plus opportunity to opt out" standard provides a rare, clear brightline rule, compared to "mere adequacy's" fuzzier judgmental standard, determinable only in subsequent proceedings.[29]

Nor can representation by one of the same attorneys or absent class members' unrealistic ability to "go it alone",[30] sufficiently substitute for these mandatory protections. *See Taylor*, 553 U .S. at 897 (absent party not adequately represented because he subsequently hired the same attorney); *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 168 (1999) (having the same attorney "created no special representational relationship between the earlier and later plaintiffs. Nor could these facts have led the later plaintiffs to expect to be precluded, as a matter of res judicata"); *Deposit Guaranty Nat.*

Pirelli Armstrong Tire Corp., 223 F.3d 1010, 1013 n. 1 (9th Circ. 2000)("When a motion is maintained against an uncertified class, only the named plaintiffs are affected by the ruling. There is no res judicata effect as to unnamed members of the purported class.").

28. In most cases, a denial or refusal to certify comes on one of the four Rule 23(a) prerequisites and so without a determination of adequacy or a finding that precludes finding it. Thus, the Seventh Circuit's view that common issues did not exist, renders the named plaintiff not adequate to represent the class's non-common issues.

29. *See Taylor*, 533 U.S. at 907 citing *Bittinger v. Tecumseh Products Co.*, 123 F.3d 877, 881 (6th Cir. 1997)(rejecting virtual representation because "crisp rules with sharp corners are preferable to a round-about doctrine of opaque standards.").

30. *In re Bridgestone/Firestone, Inc.*, 333 F.3d at 769.

Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 339 (1980) (holding "where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits.... aggrieved persons may be without any effective redress unless they may employ the class-action device."); *Shutts*, 472 U.S. at 809 (same).

Indeed, during the *Smith* oral argument, members of this Court seemed clearly to view the mere adequacy standard as a "novel and surely erroneous argument":

> Of course you...would say that the subsequent plaintiff is not bound if he was not given notice and an opportunity to opt out, even if he came back to the same court, right?

Smith Oral Argument at 25:1-4. *Certiorari* is now necessary to clarify that due process is violated when a court attempts to bind never-noticed absent members of a (b)(3) uncertified class, never-noticed members of a certified class, as well as, Thorogood's never-noticed Rule 23(f) decertified one without first properly obtaining personal jurisdiction over the parties.

II. The Seventh Circuit's Expansion Of The All Writs Act As A Separate Jurisdictional Basis, On Which To Preclude Absent Unnoticed Class Members From Pursuing Their Claims As A Class Action, Conflicts With The Eleventh And Third Circuits' Rule That The Act Does Not Provide An Alternative Basis Of Jurisdiction Over Parties Never Before The Court Who Do Not Directly Threaten The Court's Judgment.

The All Writs Act ("Act") is described as "one of the most potent weapons in the judicial arsenal" to be "used sparingly and only in the most critical and exigent circumstances". *Cheney v. United States Dist. Court for the Dist. of Columbia* 542 U.S. 367, 380 (2004); *Wisconsin Right to Life, Inc. v. Federal Election Com'n*, 542 U.S. 1305, 1306 (2004). The Act states:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1651(a). Given its extraordinary power, the Act is construed narrowly, neither creating nor enlarging original jurisdiction beyond the parties or issues adjudicated and determined in the original action. *Syngenta v. Henson*, 537 U.S. 28 (2002); *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999). Indeed, the Act is not a "jurisdictional blank check" which courts may use whenever they deem it advisable. *Matter of VMS Securities Litigation*, 103 F.3d 1317, 1324 (7th Cir. 1996).

Recognizing that, in the class context, minimum due process must always first be satisfied before subjecting absent class members to a judgment *in personam*, both the Third[31] and Eleventh[32] Circuits have refused to allow the Act to create a basis of independent jurisdiction over people who were neither before the court nor subject to its jurisdiction.

In contrast with the Seventh Circuit, the Third Circuit specifically holds that "at a threshold, [a court] must examine [their] power over the parties" and the "application of the Anti-Injunction and All Writs Act must be preceded by satisfaction of jurisdictional requirements." *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 134 F.3d 133, 140-41 (3rd Cir. 1998). Refusing to use the Act to exert personal jurisdiction over absent class members, after a previous reversal of class certification to estop them from seeking class certification in another forum, the Third Circuit explains:

> In the wake of our judgment...there is no class pending before the MDL court, and thus, virtually none of the 5.7 million class members in Louisiana are before this Court in any respect, and there is no basis upon which we can infer their consent...To be more precise, the Louisiana class members are not parties before us; they have not constructively or affirmatively consented to personal jurisdiction; and they do not, as far as has been demonstrated,

31. *In re General Motors Corp.*, 134 F.3d at 141.

32. *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d at 1246.

> have minimum contacts with Pennsylvania. Therefore, due process deprives us of personal jurisdiction and prevents us from issuing the injunction prayed for by appellants.

Id. at 141.

Similarly, in reliance on *Shutts* the Eleventh Circuit recognized that only *after* "the granting of class certification under Rule 23 [is a district court authorized] to exercise personal jurisdiction over unnamed class members who otherwise might be immune to the court's power". *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233, 1245 (11th Cir. 2006). Indeed, in contrast to the Seventh Circuit, the Eleventh Circuit declared that upon a district court's refusal to grant certification in a previous action, the absent class members "became [] stranger[s]" to the previous litigation and that "[t]he denial of class certification limited the court's *in personam* jurisdiction solely to the parties appearing before it."

The Seventh Circuit's extension of the Act's jurisdiction to never-noticed absent class members because they were in the position to frustrate *Thorogood I*'s previous court order[33] (a position which Petitioners further contest below) fails to recognize that no court has extended such power to enjoin unaware non-parties, outside the context of enforcing settlements or pre-trial discovery rulings in multi-district litigations. This Court holds such power exists only "under appropriate circumstances" where the "third party was not so far removed from the underlying litigation". *United States v. N.Y. Tel. Co.*, 434

33. *Thorogood III*, 624 F.3d at 844, 850. Appx. at 3a, 33a.

U.S. 159, 172-75 (1977)(holding that the "Company was a third party [not] so far removed from the underlying controversy that its assistance could not be permissibly compelled" and "agree[ing] that the power of federal courts to impose duties upon third parties is not without limits").[34] Furthermore, the circumstances of *N.Y. Tel. Co.* are specifically limited to the narrow facts existing in that case, and have not been extended by any circuit court to situations similar to *Thorogood.*[35] where the injunction would completely foreclose the absent class members from any effective access to the courts.[36]

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34. *N.Y. Tel. Co.*, is a limited decision permitting a federal court to order a "highly regulated public utility with a duty to serve the public [and who] had a substantial interest in [] providing assistance" to aid the FBI in a district court authorized surveillance. 434 U.S. at 174-75. In *N.Y. Tel. Co*, the Court specifically contemplated that the non-party to be enjoined was aware of the litigation and would not be burden by its order. *Id.*

35. *See Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1203 (7th Cir. 1996) (specifically recognizing *N.Y. Tel.*'s limitation to injunctions only in "appropriate circumstances", and ultimately holding that "a far-reaching and overly expansive injunction [was] an abuse of discretion."); *Andrews v. Andrews*, 160 Fed.Appx. 798, 799-800 (10th Cir. 2005)(denying injunction because "[w]hile the non-party status of an injunction's target *may* thus no longer be a conclusive impediment, it nevertheless heightens the hurdle that must be cleared to obtain the injunction: not only must the motion advance considerations satisfying the traditional injunction factors.... those considerations must also constitute the 'appropriate circumstances' referred in *New York Telephone* to justify issuing an injunction against a non-party.")(emphasis added).

36. *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1108 (11th Cir. 2004).

Indeed, preclusion of subsequent class litigation by parties is typically effectuated in order to protect an approved class settlement against class members for parties who have had notice, opportunity to object or opt out, released their claims, and have full knowledge of the settlement. In such cases, courts retaining jurisdiction to protect their final settlement orders recognize that the parties "failure to opt out manifest[s] their consent to have the district court resolve matters involving the class action settlements." *VMS Securities Litigation*, 103 F.3d at 1323. Far from failing to opt out or releasing their future claims against Sears, the absent class members here were never even provided notice of the underlying litigation and should not be foreclosed from pursing their single-state class claims.

III. The Seventh Circuit's Extended Application Of The All Writs Act Conflicts With This Court's Mandatory Conditions Precedent And With Other Circuit Courts' Exercise Of The Act's Authority.

The Seventh Circuit's application of the All Writs Act conflicts with this Court's and other circuits' standards in applying the Act narrowly and only in extraordinary circumstances.[37]

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37. In *Cheney v. United States Dist. Court for the Dist. of Columbia* 542 U.S. 367, 380-81 (2004), this Court definitively set forth what conditions precedent must exist to satisfy the Act's "necessary and appropriate" standard. First, "the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable." *Id.* at 381; *see also Gabhart v. Cocke County, Tenn.*, 155 Fed.Appx. 867, 872-73 (6th Cir. 2005) (refusing an All Writs injunction and noting the allegations were "insufficient to meet the high standard of 'clear and indisputable'" that would

A. The Seventh Circuit's Application Of The All Writs Act Conflicts With The "Clear and Indisputable" Requirements Of This Court And With The Decisions of Other Circuits.[38]

This Court further requires the propriety of an injunction under the All Writs Act to be guided by principles of *res judicata* and collateral estoppel in order to assess whether issuance of an injunction is appropriate. *See Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988).[39/40] The preclusive effect of a federal judgment is

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entitle a writ). Second, "the party seeking issuance of the writ must have no other adequate means to attain the relief he desires... a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process". *Cheney*, 542 U.S. at 380-81; *see also Clinton*, 526 U.S. at 537 (the Act "invests a court with a power essentially equitable and, as such, not generally available to provide alternatives to other adequate remedies at law."). "Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances. *Cheney*, 542 U.S. at 381; *see also Wisconsin Right to Life, Inc.*, 542 U.S. at 1306.

38. Petitioners present *Cheney*'s mandatory conditions precedent in a different manner than originally provided by the Court in order to most effectively present their arguments.

39. *Chick Kam Choo* held that a state court should be permitted to apply its own procedural rules governing access to its courts and that the relitigation exception to the Anti-Injunction Act could not be used to enjoin state-court proceedings solely on the basis that a federal court had previously applied its own procedural rules to the same issue. 486 U.S. at 148-49.

40. Indeed, if the absent un-notified class members are not collateral estoppel bind-able without notice, the All Writs Act cannot apply.

determined by federal law,[41] requiring that the parties (or their privies), issues, facts and laws previously resolved to be identical to the ones previously adjudicated.[42] *See* 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Fed. Prac. & Proc.* § 4425 (2d ed. 2002) ("Identity of the issue is established by showing that the same general legal rules govern both cases and that the facts of both cases are indistinguishable as measured by those rules. Preclusion should not apply if there has been a change either in the facts or the governing rules."). Further, the preclusive effect of injunctions issued under the Act, must be limited to issues "actually" decided by the federal court and cannot be based on "a *post hoc* judgment as to what the order was *intended* to say." *Chick Kam Choo*, 486 U.S. at 148; *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 304 (1970).

The Seventh Circuit's use of its order—reversing Thorogood's multi-jurisdictional class claims under Tennessee law—as the basis to enjoin Murray's single-state California class claims, omitted the generally required consideration of the material differences in scope of the litigation, substantive law and procedural standards,

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41. *Thorogood III*, 624 F.3d at 847, Appx. 10a citing *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508-09 (2001).

42. In diversity actions, however, the state law creating the right sued upon governs issues such as the elements of the action, measure of damages, and applicable defenses, *Bank of Calif., N.A. v. Opie*, 663 F.2d 977, 9809th Cir. 1981); *Patton v. Cox*, 276 F.3d 493, 495(9th Cir. 2002); *Shannon-Vail Five Inc. v. Bunch*, 270 F.3d 1207, 1210 (9th Cir. 2001), therefore common legal questions of reliance and the elements of Murray's consumer protection class claims—appropriately determined in the California court—would be appropriately determined by California law.

as well as the California district court's previous rejection of Sears' plea of collateral estoppel because of these material differences between the two cases.[43]

Foremost, the Seventh Circuit's order enjoining Murray's single-state California only class claims—never substantively addressing nor actually deciding anything more than that Thorogood could not pursue his claims as a multi-jurisdiction class—extends the act beyond its permitted reach, as delineated by this Court. *Chick Kam Choo,* 486 U.S. at 148; *Atlantic Coast Line*, 398 U.S. 304. *Thorogood III*'s departure from even its own determination in *Bridgestone/Firestone,* 333 F.3d at 765-66 (holding it impermissible to enjoin absent class members from pursuing single–state class actions, in the state court of their residence, based solely on the decertification of a nationwide class) itself conflicts with other circuits and evidences the need for a bright-line rule.[44]

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43. *See Murray* Dkt. No. 120.

44. *See In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d at 1257 (holding that "the Seventh Circuit decision [in *Bridgestone*].... [d]id not provide a legal basis for the district court's issuance of an injunction" against single state class proceedings under the authority of the Act; *Bailey v. State Farm Fire & Casualty Co.*, 414 F.3d 1187, 1189-90 (2005)(rejecting the notion that a global injunction necessarily flows from a denial or reversal of certification and holding that an injunction against parties seeking to bring similar claims in both federal and state courts, based on the courts previous rejection of class certification, was not an abuse of discretion.). Indeed, *Bridgestone* itself "contemplated that states would certify narrower classes". 333 F.3d. at 766.

More specifically, Murray's Unfair Competition Law ("UCL") class claims[45] obviate the need for individual proof of deception, reliance, or injury[46] which were held to be fatal in *Thorogood I*.[47] Additionally, California's and the Ninth Circuit's *objective* examination of whether a misrepresentation is material under Murray's UCL and Consumer Legal Remedies Act[48] class claims procedurally differs from the Seventh Circuit's subjective examination of materiality for purposes of evaluating predominance under Rule 23's certification standards.[49]

This contradicts the Fifth Circuit's recognition that such material distinctions between prior decisions and subsequent actions require denial of preclusion. *J.R. Clearwater Inc. v. Ashland Chem. Co.*, 93 F.3d 176, 180 (5th Cir. 1996). In rejecting the Seventh Circuit's rationale in support of an injunction—the "desire to avoid another protracted and costly round of litigation over class certification" in another court—the Fifth Circuit stated:

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45. *Cal. Bus. & Prof. Code* §17200.

46. *See Jenson v. Fiserv Trust Co.*, 256 Fed. Appx. 924, 926 (9th Cir. 2007) (holding "that when the same material misrepresentations have been communicated, an inference of reliance may arise as to the entire class.").

47. *Thorogood I*, 547 F.3d at 747.

48. *Cal. Civil Code* §1770.

49. *See e.g., Thorogood I*, 547 F.3d at 747 (discussing the subjective motivations for purchasing a stainless steel drummed dryer) *contra Jenson*, 256 Fed. Appx. at 926 (recognizing "that when the same material misrepresentations have been communicated, an inference of reliance may arise as to the entire class.") *see also Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal. App.4th 1351, 1360 (2003).

> It is our considered view that the wide discretion inherent in the decision as to whether or not to certify a class dictates that each court-or at least each jurisdiction-be free to make its own determination in this regard. *See* 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, § 4434 at 327 ("If preclusion is to be denied, it should be on the ground that many procedural matters may be so far discretionary that a second court should be free to make its own determination.")
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> ...
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> The element of discretion that inheres in this class certification determination must be emphasized. Indeed, one Texas court applying the federal collateral estoppel rules concluded that collateral estoppel did not bar relitigation of the class certification issue in part because even those aspects of the state class action rule which are identical to the federal rule have sometimes been applied differently by the state courts. Therefore, the Texas court concluded that the identity of issues necessary to collateral estoppel was lacking.

J.R. Clearwater Inc., 93 F.3d at 179-80.[50] Indeed, at least two other federal circuits would also agree that

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50. That the Fifth Circuit found such discretion "particularly applicable when matters of state-federal relations are involved," *J.R.Clearwater Inc.*, 93 F.3d at 180, does not detract from its holdings significance but rather evidences that such discretion is warranted in *all* circumstances.

preclusion is inappropriate—even if the facts are found to be identical—because the *legal standards* must be the same for preclusion purposes.[51]

Although this Court focused on this issue by hypotheticals in *Smith*'s oral argument, in hoping to "articulate th[e] rule in a way that....doesn't permit the barring of claims when there's a different standard", *Smith* Oral Argument at 42:4-9, *Thorogood* offers the Court the opportunity to directly confront the issue. This opportunity is made more important by Respondent Bayer's counsel's response to Justice Sotomayor's inquiries, acknowledging that preclusion of subsequent class certification attempts would be inappropriate where materially different legal standards apply:

> I think, Justice Sotomayor that you have to distinguish between Rule 23 and the underlying State law that's the subject of the lawsuit. And anytime a Federal court is looking at whether a class action can be certified for a violation of State law, it has to make a determination of whether—of what State law is in terms of how you prove a violation, what the elements are....

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51. *See Cincinnati Insurance Company v. Beazer Investments, LLC*, 594 F.3d 442, 445 (6th Cir. 2010)("[I]f the concern is the legal significance of those [same] facts, the legal standards to be applied must also be identical; different legal standards applied to the same set of facts create different legal issues."); *Haung Tang v. Aetna Life Ins. Co.*, 523 F.2d 811, 814 (9th Cir. 1975)("Issues are not identical if the second action involves application of a different legal standard, even though the factual setting of both suits [are] the same.")

> And you make that kind of determination, and then you move to the next step of whether that should be preclusive, which is when Rule 23 comes into play. And I think that's the point where you say, are the State standards under Rule 23 different from the Federal standards?

Smith Oral Argument at 41:18-25; 42:1-25.

As conceded above, whereas in *Murray*, the substantive law, factual allegations,[52] and legal principles significantly differ and create different standards, there is no attempt to relitigate the same issues nor is there a need for individual analysis or hearings.[53] As such, Sears' right to an injunction is not "clear or indisputable"[54] and preclusion is inappropriate.

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52. Murray's allegations are based on omissions rather than statements of material fact and do not allege that Sears disclosed to the public any significance for the claim that products had a stainless steel drum. As such, the Seventh Circuit's rationale in *Thorogood I*'s decertification is not applicable to Murray's claims.

53. *Thorogood I*, 547 F.3d at 747.

54. *Cheney*, 542 U.S. at 381.

B. The Seventh Circuit's Holding That Sears Had No Adequate Remedy Conflicts With Holdings Of The Eleventh, Third, and First Circuits, As Well As Its Own Recognition Of The Availability Of Mandamus From The Appropriate Circuit Court Of Its Own Jurisdiction.

In contrast to the Seventh Circuit's decision in *Thorogood III*, the Eleventh, Third and First Circuits have refused to enjoin parties under the All Writs Act when the parties had the "adequate remedy" to raise its claims in a "concurrent federal proceeding. " *See Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1132 (11th Cir. 2005) (holding "[t]he simple fact that litigation involving the same issues is occurring concurrently in another forum does not sufficiently threaten the court's jurisdiction as to warrant an injunction under the All Writs Act."); *Porto Rico Tel. Co. v. Puerto Rico Communications Authority*, 189 F.2d 39, 42 (1st Cir. 1951) (stating that "[a]n injunction will not be granted if it appears that the party will have an adequate opportunity in the legal action itself to interpose by way of defense and fully to avail himself of the grounds upon which he seeks to enjoin the prosecution of the action."); *Grider v. Keystone Health Plan Cent., Inc*, 500 F.3d 322, 332 (3rd Cir. 2007)(same).

Indeed, the Seventh Circuit's specific reliance on *Thorogood*'s mere existence as a proposed class action[55] conflicts with the Third Circuit's decision to vacate an All Writs injunction where "the opportunity to raise its claims in the concurrent federal proceeding sought to be

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55. *Thorogood III*, 624 F.3d at 848. Appx. at 12a.

enjoined...is deemed to provide an adequate remedy at law". 500 F.3d at 332; *see also* 18A Wright & Miller, supra § 4455, at 486 ("the court conducting the action cannot predetermine the res judicata effect of the judgment.... final enforcement of preclusion ordinarily occurs only with the decision of the court hearing a later action.").[56]

Furthermore, the Seventh Circuit's exercise of jurisdiction over absent parties proceeding in another circuit's district court, despite the availability of mandamus to the Ninth Circuit, directly conflicts with the policy behind *Cheney*'s conditions precedent[57] and the basic construct of the federal court system.[58] Indeed, the Seventh Circuit has itself exercised precisely the supervisory review, by mandamus, that it ignores in reaching out to enjoin litigation in a district court under the Ninth Circuit's authority. *See In re Rhone-Poulenc Rorer Inc*, 51 F.3d 1293, 1294 (7th Cir. 1995) (holding that "[e]ven nonappealable orders can be challenged by asking the court of appeals to mandamus the district court.").[59]

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56. The Seventh Circuit's citation to "similar cases" holding that an injunction is "preferable to the harassment of an expensive, time-consuming procedure," *Thorogood III*, 624 F.3d at 850, Appx. at 17a—enjoining only parties involved in or aware of the litigation—are inopposite.

57. *Cheney*, 542 at 380-81 ("no other adequate remedy" [is] a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process").

58. *See* 28 U.S.C. § 1292(b).

59. The availability of mandamus to the appropriate federal court of appeals has also been recognized in other circuits. *See, e.g., In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1022 (5th Cir. 1997); *In re Philippine Nat'l. Bank*, 397 F.3d 768, 775 (9th Cir. 2005); *In re*

Sears' decision to circumvent its Ninth Circuit remedies and instead seek a global injunction in the Illinois district court, before even attempting to utilize the adequate and appropriate remedies available in California against people over whom jurisdiction was terminated, evidences its disregard for the statutory framework of appellate supervision, as well as traditional judicial procedures. *See* 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Fed. Prac. & Proc. Juris.* § 4405, at 82 (2d ed. 2002) ("The first court does not get to dictate to other courts the preclusion consequences of its own judgment...").

C. The Seventh Circuit's Order To Enjoin Murray Conflicts With Holdings Of The Ninth, Third, And Fifth Circuits By Its Cross-Circuit Management Of A Court of Equal Dignity, And Is Not "Otherwise Appropriate" As Required By This Court.

The Eleventh, Third and First Circuits' refusal to issue All Writs injunctions when parties have the opportunity to adequately raise their claims in subsequent proceedings finds additional support in the other circuits' refusal to direct "a court of equal dignity-another federal district court" to enjoin defendants from settling or attempting to settle related class claims. *Negrete v. Allianz Life Insurance Company of North America*, 523 F.3d 1091, 1099 (9th Cir. 2008). Warning against situations similar to the Seventh Circuit's displacement of the adequate and appropriate judicial procedures in *Thorogood III*, the Ninth Circuit explained:

Kaiser Steel Corp., 911 F.2d 380, 388 (10th Cir. 1990); *Prudential Ins. Co. of America v. U.S. Gypsum Co.*, 991 F.2d 1080, 1081 (3rd Cir. 1993).

> [T]he mere form of the injunction does not describe its true reach. In form, it is directed to [the party and their attorneys]. In substance it interferes with proceedings in other courts... [O]rdering the parties not to proceed is tantamount to enjoining the proceedings[.] While the cited cases apply to the Anti-Injunction Act, [they apply] to the All Writs Act as well, for it is the restraint on other court proceedings that is problematic.

Id. at 1098. Similarly, the refusal to usurp the jurisdiction of another district judge was the motivation for the Third Circuit's refusal to enjoin a related federal court from pursuing class settlement in *Grider*, and the Fifth Circuit's denial of an injunction in *J.R.Clearwater Inc. Grider*, 500 F.3d at 332 (explaining that "courts must operate on the basis of the assumption that all federal judges follow the law and protect the rights of the class members in accordance with Rule 23"); *J.R. Clearwater Inc.*, 93 F.3d at 180 (holding "the wide discretion inherent in the decision as to whether or not to certify a class dictates that each court-or at least each jurisdiction-be free to make its own determination in this regard.").

Sears was sufficiently afforded both the opportunity to brief and orally argue its defense of collateral estoppel in California, where the California district court applied the appropriate analysis and standards under the laws of its home forum.[60] That Sears did not do so persuasively does

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60. Notably, the California public interest requires that relitigation of California consumer protection claims not be foreclosed. *Nein v. HostPro, Inc.* 174 Cal. App. 4th 833, 845 (2d Dist. 2009) (collateral estoppel not applied if injustice would result

not make such opportunity inadequate and the Seventh Circuit's disruption of the California court's authority is not "otherwise appropriate" as required by this Court.[61]

CONCLUSION

Thorogood III provides the ripe real life vehicle to now determine the remaining hypothetical inquiries posed by the Justices at oral argument in *Smith*[62] related to the jurisdictional reach and appropriate scope of the All Writs Act, and to halt the Seventh Circuit's departure from the otherwise unanimous circuit adherence to this Court's brightline rule that courts lack jurisdiction to bind absent class members *in personam* without first affording them notice and the opportunity to opt out or participate in the class in any circumstance.

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or if the public interest requires that relitigation not be foreclosed). California courts recognize that consumer protection laws protect important public interests and encourage the use of class action procedures. *See e.g. Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 703 (2006); *Gardner v. Shell Oil Co.*, 09-05876 CW, 2010 WL 1576457 (N.D. Cal. Apr. 19, 2010).

61. *Cheney*, 542 U.S. at 381; *Wisconsin Right to Life, Inc.*, 542 U.S. at 1306.

62. *See supra* fn. 17.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DECIDED NOVEMBER 2, 2010

In the
United States Court of Appeals
For the Seventh Circuit

No. 10-2407

STEVEN J. THOROGOOD, individually
and on behalf of all others
similarly situated,

Plaintiff-Appellee,

v.

SEARS, ROEBUCK AND COMPANY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 06 C 1999—**Harry D. Leinenweber**, *Judge.*

SUBMITTED OCTOBER 12, 2010—
DECIDED NOVEMBER 2, 2010

Before POSNER, KANNE, and EVANS, *Circuit Judges.*

Appendix A

POSNER, *Circuit Judge*. In this third appeal arising out of a near-frivolous class action suit by Steven Thorogood, Sears Roebuck, the defendant, asks us to reverse the district court, which has denied Sears's motion to enjoin a virtually identical class action suit—a suit filed in the name of Martin Murray by counsel who represented Thorogood, and pending in a federal district court in California. *Murray v. Sears, Roebuck & Co.*, No. 4:09-cv- 5744-CW (N.D. Cal.). Judge Leinenweber, who had presided over Thorogood's suit and to whom Sears's motion for an injunction was referred, ruled that Sears could obtain adequate relief against being harassed by repetitive litigation by pleading collateral estoppel in Murray's suit. Sears appeals.

Class counsel challenge the jurisdiction of the district court over Sears's motion and our jurisdiction over Sears's appeal. Thorogood's suit was resolved by the entry of a final judgment in favor of Sears without reservation of jurisdiction, and so was no longer pending when Sears asked the district court to enjoin the California suit. But Sears's motion had been filed under the "All Writs Act," which authorizes a federal court to issue "all writs necessary or appropriate in aid of [its] jurisdiction[ ] and agreeable to the usages and principles of law," 28 U.S.C. § 1651(a), and which has been interpreted to empower a federal court "to issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172 (1977). This power "extends, under appropriate circumstances, to persons who, though

not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice." *Id.* at 174 (citations omitted). For the application of these principles in class action suits, see, e.g., *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, 333 F.3d 763, 768 (7th Cir. 2003); *In re VMS Securities Litigation*, 103 F.3d 1317, 1323-24 (7th Cir. 1996); *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1200-01 and n. 4 (7th Cir. 1996).

A person seeking such an order applies to the court that issued the judgment. No other basis of jurisdiction need be shown. *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation, supra*, 333 F.3d at 768; *Bryan v. BellSouth Communications, Inc.*, 492 F.3d 231, 236 (4th Cir. 2007); *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1100 (11th Cir. 2004). So class counsel's jurisdictional challenge fails.

The district court at our direction had decertified Thorogood's class, 547 F.3d 742 (7th Cir. 2008), and Sears argues that by filing a nearly identical suit Thorogood's lawyer has defied that judgment. Consistent with the principles set forth above, "the All Writs Act empowers a federal court to enjoin parties before it from attempting to relitigate decided issues and to prevent collateral attack of its judgments." *In re March*, 988 F.2d 498, 500 (4th Cir. 1993); see also *TBG, Inc. v. Bendis*, 36 F.3d 916, 925-27 (10th Cir. 1994); *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1524 (9th Cir. 1983). Thus

the only question is whether the district judge abused his discretion in ruling that a plea of collateral estoppel in the California litigation would give Sears adequate relief from the consequences of the refusal of Thorogood's lawyer—who found someone (Murray) willing to be the nominal plaintiff in a copycat suit in California—to accept defeat.

We remind the reader of the quixotic nature of the quest on which Clinton Krislov, the plaintiff's lawyer in Thorogood's case (including the current appeal), as well as in the California litigation (though he has co-counsel there, as we'll have occasion to note), has embarked. Thorogood, a Tennessean, bought a Kenmore-brand clothes dryer from Sears (Kenmore is a Sears brand name). The words "stainless steel" were imprinted on the dryer, and point-of-sale advertising explained that this meant that the drum in which the clothes are dried was made of stainless steel. Thorogood claimed to have thought that this meant that the drum was made *entirely* of stainless steel, whereas part of the front of the drum—a part the user would see only if he craned his head inside the drum—is made of a ceramic-coated "mild" steel, which is not stainless steel because it doesn't contain chromium. Thorogood alleged that the "mild" steel in the drum rusted, and stained his clothes.

Lawyer Krislov filed a class action suit on behalf of Thorogood and a half million other purchasers, scattered across 28 states plus the District of Columbia, of Kenmore dryers that had been advertised as having stainless steel drums. The suit claimed that the sale of a dryer so advertised is deceptive unless the drum is made entirely

of stainless steel because otherwise it might rust and by doing so stain the clothes in the dryer. Thorogood's individual claim was based on Tennessee's consumer protection statute but the suit alleged that the unnamed class members had identical claims under similarly worded state consumer protection statutes in their own states, including California.

The suit was originally filed in a state court but was removed to federal district court under the Class Action Fairness Act, 28 U.S.C. §§ 1332(d), 1453, 1711-1715. Judge Leinenweber certified the class. We accepted Sears's appeal from the order of class certification, Fed. R. Civ. P. 23(f), and reversed, ordering the class decertified. We called the case "a notably weak candidate for class treatment." Not only did common issues of law or fact not predominate over the issues particular to each purchaser of a stainless steel Kenmore dryer, as Rule 23(b)(3) requires; there were, we said, "*no* common issues of law or fact." 547 F.3d at 746-47 (emphasis in original).

It was well-nigh inconceivable that the other members of the class had the same understanding of Sears's advertising as Thorogood claimed to have. Sears hadn't advertised the dryers as preventing rust stains on clothes; and it's not as if such stains are a common concern of owners of dryers—there was no suggestion of that either. Stainless steel appliances are popular even among consumers, undoubtedly the vast majority, who do not expect a dryer to cause rust stains. Stainless steel does not rust, and that is certainly a plus, clothing stains to one side. But ceramic doesn't rust either. Many people

prefer a stainless steel appliance because it is highly durable, does not stain (we are referring here to stains on the machine, rather than on the clothes being dried in it), and, when polished, looks better (some people think) than ceramic—but not because they think that a dryer drum that contains a bit of "mild" steel, which anyway is coated with ceramic, would cause rust stains on their clothes. Consumers whose preference for stainless steel is unrelated to an anxiety (probably unreasoning) about rust stains would not be upset to discover that a small, inconspicuous portion of the drum was made of a different kind of steel that anyway was coated with ceramic and hence was rust proof.

Advertisements for clothes dryers mention a host of features that might matter to consumers, such as price, size, electrical usage, appearance, speed, and controls, but not the prevention of clothing stains attributable to rust. The litigation of the class members' claims would thus have devolved into a series of individual hearings in which each class member who wanted to pursue relief against Sears would testify to what he understood to be the meaning of a label or an advertisement that identified a clothes dryer as containing a stainless steel drum. Few if any of them, we imagine, would share Thorogood's concerns, which, judging from the record in his case and the argument of his lawyer, are a confabulation. But the important point is that there would be no economies of class action treatment because there would be no issues that could be resolved in a single, class-wide evidentiary hearing.

An additional consideration in deciding whether to allow the claims in a suit to be litigated as a class action

is relief. Thorogood was seeking on behalf of himself and the members of the class actual damages rather than statutory damages; the latter might not require individual proof, but calculation of actual damages would. And even if there were other consumers who like Thorogood were prepared to testify that they wouldn't pay a premium for a dryer that contained a drum that was not 100 percent stainless steel, the amount of damages would vary from consumer to consumer. A few might (though we were and are dubious) have experienced rust stains, or be fearful of experiencing them, and therefore seek as damages either the cost of removing the stains, or the difference between the resale value of their stainless steel dryer and what a new dryer would cost, or both. Others may have bought a Kenmore at a discount and as a result ended up paying no more than they would have paid for a machine with a porcelain drum. And some—since the Kenmore's stainless steel drum is packaged with other premium features rather than offered as a separately priced option— may have incurred no damages at all, because they prefer their stainless steel dryer to any other dryer they could buy even if the stainless steel feature itself was a neutral or even negative consideration in their purchasing decision.

The difficulty of determining the relief to which individual class members in Thorogood's suit who could prove that they had been deceived by Sears's representations might be entitled, though serious, was not the deal breaker, because "aggregate class proof of monetary relief may . . . be based on sampling techniques or other reasonable estimates, under accepted rules of evidence." 3 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 10.3, p. 480 (4th ed. 2002). The deal

breaker was the absence of any reason to believe there was a single understanding of the significance of advertising clothes dryers as containing a stainless steel drum, and so a predominating issue that was common to all class members.

After we ordered the class decertified, thus shrinking the suit to Thorogood's individual claim, and with the parties in agreement that the maximum damages that he could recover under Tennessee law were $3,000, Sears made Thorogood an offer of judgment under Rule 68 of the civil rules of $20,000 inclusive of attorneys' fees. The district judge, believing that Thorogood should receive no attorneys' fees, dismissed the suit because the defendant's offer exceeded the amount in controversy ($3,000, without attorneys' fees), and so the case was moot. Thorogood appealed. He had, he claimed, incurred attorneys' fees of $246,000, and even though they exceeded the value of the relief he had received by a factor of 82, he claimed that the fees had been a worthwhile investment that Sears should be ordered to reimburse him for. Because Sears had offered him in settlement an amount equal to the maximum damages (and more) that he could have obtained for his individual claim, he argued that his theory of liability had been vindicated, entitling him to a judgment on which he hoped to build a claim for attorneys' fees and, as we'll see, obtain a litigation advantage in other states.

The argument for attorneys' fees was beyond weak. The relief that Thorogood had received was not ordered by a court and could by no stretch of the imagination be thought a vindication of a threadbare, idiosyncratic claim

worth at most $3,000. The $246,000 in attorneys' fees that class counsel sought reimbursement for had been incurred in a doomed effort to maintain the suit as a class action; no one incurs such fees to prosecute a claim worth at most $3,000. Sears was paying to rid itself of a nuisance. The effort to escalate Thorogood's dubious claim into a sprawling nationwide class action had been a flop. Not believing that Sears should have to bear the entire cost of the flop, we affirmed the district court's denial of attorneys' fees and dismissal of the suit. 595 F.3d 759 (7th Cir. 2010).

Thorogood's counsel had told the district court that he wanted a judgment in his client's individual case, for however little money, not only as a premise for an award of attorneys' fees but also so that he could use it as "offensive" res judicata in other cases (that is, to preclude Sears's defending similar cases on the merits); for he was already planning to circumvent our order decertifying the class by bringing class actions elsewhere. The California suit here sought to be enjoined was thus foreordained, and unless enjoined will be the precursor to other class actions materially identical to Thorogood's. For lawyer Krislov is nothing if not determined, indeed pugnacious.

He argues that Murray's case is "different" from Thorogood's. Yet Murray was a member of Thorogood's class; and Krislov (who as we noted is also Murray's counsel) had represented to us in Thorogood's case that the laws of all 29 jurisdictions in which members of the class resided were so similar, as far as the claims in his class action suit were concerned, that "all litigants

[including all class members] are governed by the same legal rules"—"plaintiff will need to prove the *same standards* for every jurisdiction" (emphasis in original)—" all the class members here are covered by the same legal rule"—"plaintiff has essentially created a subclass of all jurisdictions with the same substantive consumer fraud statute."

Now singing a different tune, Krislov contends that California's consumer fraud law is different from that of the other 28 jurisdictions. We'll see that the contention is irrelevant to the applicability of collateral estoppel. He also contends that the California state courts are reluctant to apply collateral estoppel to judgments in consumer protection cases. That, if true, is also irrelevant, because the preclusive effect of a federal judgment, in this case the judgment of the district court in Illinois decertifying Thorogood's class, is determined by federal law. *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508-09 (2001); *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, *supra*, 333 F.3d at 767-68; *In re Baycol Products Litigation*, 593 F.3d 716, 721 (8th Cir. 2010), cert. granted under the name *Smith v. Bayer Corp.*, No. 09-1205, 2010 WL 1526440 (Sept. 28, 2010). Often, as these opinions note, the federal court will "borrow" the local state's doctrine of collateral estoppel to serve as the federal rule of decision. But a court in Illinois would not borrow the California doctrine when the named plaintiff in the suit in which the federal judgment was issued was a Tennessean suing under Tennessee law.

The class in Murray's case is of course smaller than Thorogood's because it is limited to California purchasers,

but it is still very large. The claims in Murray's case, when Sears pleaded the defense of collateral estoppel, were identical to Thorogood's; they challenged the same advertising for the same models of clothes dryer. Murray acknowledged that he was alleging "a similar general set of operative facts as alleged in the *Thorogood* case." And although normally " 'one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process,' *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) . . . [,] in a class action, for example, a person not named as a party may be bound by a judgment on the merits of the action, if she was adequately represented by a party who actively participated in the litigation. See *id.*, at 41 . . . . Representative suits with preclusive effect on nonparties [thus] include properly conducted class actions." *Taylor v. Sturgell*, 553 U.S. 880, 884, 894-95 (2008).

And so the district court in California ruled that Murray was collaterally estopped to bring his suit as a class action. But Murray then amended his complaint to allege additional facts in an effort to show that he had a different case, perhaps one more amenable to class action treatment. On the basis of the amendment the district judge in California reversed his earlier ruling, and having thus rejected the defense of collateral estoppel allowed discovery to begin. Murray then issued bulky discovery requests. The district judge, as far as we know, will not rule on whether the suit can be maintained as a class action suit because common issues predominate over individual class members' issues, until discovery is complete.

Ordinarily the ability to plead res judicata or collateral estoppel gives a litigant adequate protection against being harassed by repetitive litigation by the loser in a previous suit against him. And when the remedy at law (as by pleading a defense to a damages action) for harmful conduct is adequate, there is no basis for an injunction, including injunctive relief under the All Writs Act. But this case is unusual both because it involves class action litigation and because of the specific tactics employed by class counsel, which include, as we'll see, something close to settlement extortion.

The class action is a worthwhile device for economizing on the expense of litigation and enabling small claims, illustrated by Thorogood's claim, capped at $3,000, to be litigated at all (though when the claim is deceptive advertising, a proceeding before the Federal Trade Commission is a more economical alternative to a class action suit). But the device also lends itself to abuse. As Judge Friendly pointed out many years ago, class members are interested in relief for the class but the lawyers are primarily interested in their fees, and the class members' stakes in the litigation are ordinarily (and in the present case or cases) too small to motivate them to supervise the lawyers in an effort to align the lawyers' incentives with their own. *Saylor v. Lindsley*, 456 F.2d 896, 900-01 (2d Cir. 1972). Defendants, wanting to minimize the sum of the damages they pay the class and the fees they pay the class counsel, are willing to trade small damages for high attorneys' fees, especially since, as Judge Friendly put it in another case, "a juicy bird in the hand is worth more than the vision of a much larger one in the bush, attainable

only after years of effort not currently compensated and possibly a mirage." *Alleghany Corp. v. Kirby*, 333 F.2d 327, 347 (2d Cir. 1964) (dissenting opinion). These convergent incentives forge a community of interest between class counsel, who control the plaintiff's side of the case, and the defendants, but may leave the class members out in the cold.

The judge who presides over a class action and must approve any settlement is charged with responsibility for preventing the class lawyers from selling out the class, but it is a responsibility difficult to discharge when the judge confronts a phalanx of colluding counsel. "The defendant wants to minimize outflow of expenditures and the class counsel wants to increase inflow of attorneys' fees. Both can achieve their goals if they collude to sacrifice the interests of the class." Christopher R. Leslie, "The Significance of Silence: Collective Action Problems and Class Action Settlements," 59 *Fla. L. Rev.* 71, 79-81 (2007) (footnote omitted); see also (besides references in our original opinion) John C. Coffee, Jr., "Litigation Governance: Taking Accountability Seriously," 110 *Colum. L. Rev.* 288, 326-27 (2010).

Another problem with the class action is the enhanced risk of costly error, which creates a pressure for settlement that may be disproportionate to the actual merits of the suit. Suppose a company is sued a number of times for selling a defective product. It wins some of the cases and loses others, so that the aggregate outcome reflects more or less accurately the expected litigation value of the plaintiffs' claims. (This assumes no offensive res judicata,

which would give preclusive effect to the plaintiff's first win. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299-1300 (7th Cir. 1995).) But when the central issue in a case is given class treatment and so will be resolved once and for all, a trial becomes a roll of the dice. Depending on the size of the class, a single throw may determine the outcome of an immense number of separate claims (hundreds of thousands, in the dryer litigation)—there is no averaging of decisions over a number of triers of fact having different abilities, priors, and biases. The risk of error becomes asymmetric when the number of claims aggregated in the class action is so great that an adverse verdict would push the defendant into bankruptcy; in such a case the defendant will be under great pressure to settle even if the merits of the case are slight. *Id.* at 1298-99. A small probability of a large dollar loss can be a large dollar figure.

A variant of this problem arises when class counsel can, as they are attempting to do in their scorched-earth campaign against Sears, increase the number of throws of the litigation dice. If for example class counsel have a 10 percent chance of winning a given statewide class action against a given defendant, and they sue that defendant 50 times (one suit per state), they are pretty certain to win quite a number of their cases, although the aggregate damages will be smaller than if they won a single nationwide class action. Even if class counsel filed only 12 cases, the probability that the defendant would win them all would be only 28 percent (.9 = .28). And that 12 probability (the probability of the defendant's winning all the cases) would fall to one-half of one percent (.950 = .005)

if class counsel sued in all 50 states. And this despite the fact that the defendant in our example has a 90 percent chance of winning any one of the 50 cases.

An additional asymmetry, also adverse to defendants, involves the cost of pretrial discovery in class actions. One purpose of discovery—improper and rarely acknowledged but pervasive—is: "it makes one's opponent spend money." Brian Anderson & Andrew Trask, *The Class Action Playbook* § 4.5, pp. 115-16 (2010); see Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System, "Interim Report," p. 1 (Aug. 1, 2008), www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=3650 (visited Oct. 15, 2010). In most class action suits, including this one, there is far more evidence that plaintiffs may be able to discover in defendants' records (including emails, the vast and ever-expanding volume of which has made the cost of discovery soar) than vice versa. For usually the defendants' conduct is the focus of the litigation and it is in their records, generally much more extensive than the plaintiffs' (especially when as in a consumer class action the plaintiffs are individuals rather than corporations or other institutions), that the plaintiffs will want to rummage in quest for smoking guns.

The merit of Murray's case, like Thorogood's, of which it is a close copy, is slight. But the pressure on Sears to settle on terms advantageous to its opponent will mount up if class counsel's ambitious program of discovery is allowed to continue. A letter from Mark Boling, Murray's

co-counsel, to Sears's counsel, printed at the end of this opinion, illustrates the point. The letter reminds Sears that discovery is proceeding and "will involve Plaintiff's counsel delving into the full extent of Defendants' alleged wrongdoing" in order to justify not only equitable relief but also punitive damages—which are potentially very large given the size of the class and the possible preclusive use of any judgments favorable to the plaintiffs in suits brought in other states. The letter continues: "as we progress through the various stages of this litigation, the cost of settlement will necessarily increase . . . . At this point, we may want to consider whether an appropriate olive branch for resolution can be mutually created on a class wide basis commensurate with the status of the case. If interested, please pick up the telephone and call me. In the meantime, Plaintiff will continue to diligently and timely prosecute this case to an appropriate result." In other words, unless Sears settles now (implicitly for modest relief for the class and an agreement with class counsel to recommend to the judge generous fees for Krislov and Boling), it will incur the considerable cost of responding to class counsel's distended project of "delving" and assume the risk of a very large adverse judgment. And as Boling's letter also points out, "if plaintiff is successful on a motion for class certification, the court as the gate keeper will demand a more significant recovery for resolution."

The threat to turn the screws on Sears is all the more credible because Murray's suit is a duplicate of Thorogood's, with just enough differences to confuse the district judge in California about Sears's defense of collateral estoppel. If the refusal to enjoin Murray's suit

sticks, there is nothing standing in the way of Krislov's filing carbon-copy class actions against Sears in other states as well.

In refusing to enjoin Murray's suit, Judge Leinenweber mentioned none of these considerations. He seems to have believed that pleading res judicata or collateral estoppel *always* provides adequate relief against vexatious litigation. This case shows that it does not, as do the similar cases we cited earlier and the cases that say that enjoining vexatious litigation is preferable to "the harassment of an expensive, time-consuming procedure to prove [a defendant's] res judicata or estoppel claims in another court." *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 552 F.2d 601, 603 (5th Cir. 1977); see also *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 123-24 (2d Cir. 2007); *In re Hartford Textile Corp.*, 681 F.2d 895, 897 (2d Cir. 1982); *Blanchard v. Commonwealth Oil Co.*, 294 F.2d 834, 841 (5th Cir. 1961).

The district judge in California, by rescinding his acceptance of Sears's defense of collateral estoppel and allowing discovery to proceed, has visited on Sears the consequences that the injunction that Sears sought from the district court in Illinois would have prevented. Murray's case was removed to federal district court in California in December 2009 and as of early October of this year had already accrued 126 docket entries. There is no way in which Sears can recoup the expense of responding to Murray's extravagant discovery requests and of filing preclusion defenses against duplicative class

actions in other states. The harm it faces from the denial of the injunction is irreparable and its remedy at law against settlement extortion nonexistent.

Of course we must pay respectful attention to the ruling by the district judge in California. But we cannot brush aside Sears's challenge to its correctness by telling Sears to appeal to the Ninth Circuit. It can't, at least in time to avert irreparable harm, because the judge's order rejecting the defense of collateral estoppel and thus letting discovery proceed is an unappealable interlocutory order. Sears's action under the All Writs Act is its only means, other than submitting to lawyer Boling's demands, of avoiding being drowned in the discovery bog.

The district judge in California said that Murray had "sufficiently amended his complaint so as to differentiate it from the complaint in *Thorogood* to avoid the application of collateral estoppel." Murray had done this, the judge continued, by "includ[ing] allegations that [Sears had] expressly advertised the significance of the fact that [the] dryers contain stainless steel drums," for example by advertising that "Durable Drum *eliminates rusting and chipping* for long lasting performance" and "KEEP YOU [*sic*] CLOTHES LOOKING GREAT: an exclusive, *all stainless steel drum* provides lasting durability" (emphasis in original). The judge said: "These allegations are of the precise type that the Seventh Circuit said would distinguish *Thorogood* from a claim in which common issues might predominate."

The judge has misunderstood both the ads and our opinion. It's true that stainless steel does not rust or chip,

and therefore a dryer that is made, even if only in part (the drum), of stainless steel should indeed provide "lasting durability." But the claim is not falsified if a small part of the drum is made of "mild" steel coated with ceramic. And a dryer's durability has nothing to do with rust stains in clothing, Thorogood's contention and Murray's as well. The only reference to stains in the advertising of the dryer is the claim, mysteriously quoted in Murray's 129-paragraph amended complaint, that "stainless steel also resists staining *from* clothes" (emphasis added), that is, the staining of the dryer itself.

Our original opinion discussed a representation by Sears in marketing the dryer that is materially identical to the one that the district judge in California quoted from Murray's amended complaint to show that Murray's suit is critically different from Thorogood's—"Stainless Steel Drum resists rust and won't chip, peel or snag clothes." 547 F.3d at 747. There is nothing new in Murray's complaint that would allow an escape from the bar of collateral estoppel. The critical issue was and is what consumers would understand by representations that the Kenmore dryer has a stainless steel drum. Would they think it meant that the drum was 100 percent stainless steel? Would they not have bought it had they thought it was only 99 percent stainless steel? These questions can't be answered on a class-wide basis, and so there would be no economies from allowing the suit to proceed as a class action.

The question is not whether Murray has a stronger case than Thorogood had. What collateral estoppel does is forbid the reexamination, in a subsequent suit, of a

finding essential to a previous decision. *Montana v. United States*, 440 U.S. 147, 153-54 (1979); *Chicago Truck Drivers, Helpers & Warehouse Union (Independent) Pension Fund v. Century Motor Freight, Inc.*, 125 F.3d 526, 530 (7th Cir. 1997). The finding is that common issues did not predominate in Thorogood's suit. Well, neither do they in Murray's; the differences between the suits do not bear on that finding. The judge in California thus was wrong; Murray's suit is barred by collateral estoppel. But because of the cost of responding to discovery, and the erroneous but unappealable ruling permitting discovery in Murray's suit, Sears has no adequate remedy at law against a litigation aimed at coercing a settlement by running up Sears's discovery expense.

Abuse of litigation is a conventional ground for the issuance of an injunction under the All Writs Act, e.g., *In re Martin-Trigona*, 737 F.2d 1254, 1262 (2d Cir. 1984), because without an injunction a defendant might have to plead the defense of res judicata or collateral estoppel in a myriad of jurisdictions in order to ward off a judgment, and would be helpless against settlement extortion if a valid such defense were mistakenly rejected by a trial court.

So Sears is entitled to an injunction. But we must be careful about precisely who and what are to be enjoined. Sears wants to enjoin all members of the class that was decertified pursuant to our decision in Thorogood's case, plus their lawyers. The lawyers should indeed be included in the injunction, as has been done in other cases. See *In re Bridgestone/Firestone, Inc., Tires Products Liability*

Litigation, *supra*, 333 F.3d at 769; *Newby v. Enron Corp.*, 302 F.3d 295, 300-03 (5th Cir. 2002) (the "district court had authority under the All Writs Act to enjoin [the law firm] from filing future state court actions without its permission and did not abuse its discretion in doing so"); *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, 271 F. Supp. 2d 1080 (S.D. Ind. 2003), on remand from 333 F.3d 763 (7th Cir. 2003) (" 'all members of the putative national classes . . . , *and their lawyers*,' are hereby prohibited 'from again attempting to have nationwide classes certified over defendants' opposition with respect to the same claims' ") (emphasis added) (the interior quotation is from this court's opinion in *In re Bridgestone/Firestone*); cf. *Lorillard Tobacco Co. v. Chester, Willcox & Saxbe*, 589 F.3d 835, 837 (6th Cir. 2009). If Krislov and the other class counsel are not enjoined, they will continue their state-by-state quest for certification and will doubtless be able to find at least one lead plaintiff in every state.

Nevertheless Sears's proposed injunction suffers from defects both of under- and of overinclusion. On the one hand, an injunction against class action suits "based on the same allegations" as Thorogood's suit would not bar even Murray's suit, since he's added allegations, though his claim is materially the same. On the other hand, (1) Thorogood's class consisted of hundreds of thousands of persons scattered across the country, and there is no feasible means of notifying them of the injunction; (2) no one can be enjoined from filing an individual suit, as distinct from a class action suit, on the basis of a finding relating only to class certification; and (3) there is an

additional defendant in Murray's suit—Electrolux Home Products, Inc., the manufacturer of the Kenmore dryer—and it is not a party to the proceeding under the All Writs Act or to this appeal and is therefore entitled to no relief. All these qualifications must be reflected in the injunction.

The members of Thorogood's class must be enjoined as well as the lawyers so that additional Murrays don't start popping up, class action complaint in hand, all over the country, represented by other members of the class action bar. It is true as we recall that an unnamed class member can be bound by the judgment in a class action suit only "if she was adequately represented by a party who actively participated in the litigation." *Taylor v. Sturgell*, *supra*, 553 U.S. at 884. But Thorogood did participate actively in seeking class certification, and his representation by lawyer Krislov was adequate (it was energetic and pertinacious to a fault).

We ordered the class decertified because of the absence of issues common to all the class members. That ruling—as the injunction must make clear—does not preclude any of the class members from filing individual suits. For it was not a ruling on the merits of any class member's claim (including Thorogood's). All that's precluded is the filing (by members of Thorogood's class, which includes the members of Murray's class, or by the lawyers for those classes) of class action suits that are indistinguishable, so far as lack of commonality among class members' claims is concerned, from Thorogood's. See *Hansberry v. Lee*, *supra*, 311 U.S. at 40-42; *Tice v. American Airlines, Inc.*, 162 F.3d 966, 971 (7th Cir. 1998); *In re Prudential Ins.*

Co. of America Sales Practice Litigation, 261 F.3d 355, 366 (3d Cir. 2001).

The injunction should state that no unnamed class member can be punished for contempt until and unless a copy of the injunction is served on him; should cover all class action suits challenging representations, in Sears' existing advertising, labeling, and other marketing that the stainless steel drums in Kenmore dryers are made of stainless steel; and should not forbid class action suits challenging representations materially different from those in Thorogood's and Murray's cases, or representation concerning a dryer that contains a different amount of stainless steel.

There is a final wrinkle to be considered. Naturally Sears wants to enjoin further class action suits concerning the dryers regardless of whether they are filed in state court and not removed to federal court, or filed in state court and removed to federal court as in the present case, or filed originally in federal court. But a federal court's injunction against a suit in state court must comply with the limitations imposed by the Anti-Injunction Act, 28 U.S.C. § 2283, and in *Smith v. Bayer Corp.*, *supra*, the Supreme Court has granted certiorari to decide two issues of interpretation (summarized by SCOTUSblog, "Smith v. Bayer Corp.," www. scotusblog.com/case-files/cases/smith-v-bayer-corp (visited Oct. 18, 2010)) that could affect the scope of an injunction in the present case:

> 1. Whether . . . a district court can enjoin parties from seeking class certification in

> state court under state procedural rules when the district court had previously denied certification of a similar class under federal procedural rules but neither the parties sought to be estopped nor the issues to be presented in state court are identical as those presented to the district court. 2. Whether a district court that previously denied class certification nonetheless has personal jurisdiction over the absent putative class members such that it may enjoin them from seeking class certification in state court.

The judge should nevertheless make the injunction applicable to further copycat suits in state as well as in federal courts. But he should make clear that persons subject to it will be allowed to obtain modification in light of the Supreme Court's decision in the *Smith* case, when it is rendered.

We do not think it likely that the Court will go so far as to hold that injunctive relief against class-action harassment is inappropriate under the All Writs Act even when the actions sought to be enjoined are actions in federal rather than state court, on the theory that before certification class members cannot be thought to have been adequately represented. That would be inconsistent with the Court's opinion in *Taylor* and the cases cited in it. And quite apart from the green light that such a ruling would give to extortionate class action practice, a denial of relief would make no sense in a case like this, in which the class (Thorogood's) *was* certified, albeit later decertified at our

direction. Class counsel had and took the opportunity to litigate the certification issue fully—so that to say that a ruling against certification could not be the basis of an injunction would be inconsistent with the doctrine of collateral estoppel itself. There is no denying that a final ruling against certification has collateral estoppel effect. And the basis of the injunction sought in this case is simply the need for enforcing collateral estoppel more effectively than by forcing the defendant to plead it as a defense in case after case.

We leave the details of the injunction to be worked out by the district judge, but commend for his consideration similar injunctions entered in *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation* (by the district court on remand); *In re Prudential Ins. Co. of America Sales Practice Litigation*, *supra*, 261 F.3d at 360-61, and *Wood v. Santa Barbara Chamber of Commerce, Inc.*, *supra*, 705 F.2d at 1523 n. 6.

REVERSED AND REMANDED.

Appendix A

APPENDIX—THE BOLING LETTER

From: Mark Boling

Sent: Monday, September 06, 2010 7:26 PM

To: Dosker, Mark C.; Mark S. Mester; Oliss, Philip M.

Subject: Murray: OPC—Settlement Communication

Dear Counsel,

Your law firms have represented Defendants honorably, but unsuccessfully, on the issue of collateral estoppel in this case. At every significant stage of a lawsuit, a business decision must be made by the parties to extend and accept an olive branch for resolution of the case or continue to litigate. We are at one of those stages.

Judge Wilken has decided in Dkt No. 120 ("Order") that the Murray case will go forward with class claims. In so doing, this district court has also preliminarily determined that the toughest requirement for class certification, i.e. common issues of fact and law, exists in this case as compared with the *Thorogood* case.

> "Plaintiff has sufficiently amended his complaint so as to differentiate it from the complaint in Thorogood to avoid the application of collateral estoppel. Unlike the complaint in Thorogood, the amended complaint includes allegations that Defendants expressly advertised the

> significance of the fact that their dryers contain stainless steel drums. For instance, Sears' website describes the "Stainless Steel Drum" as "Durable Drum eliminates rusting and chipping for long lasting performance." First Amended Complaint (1AC) ¶50 (emphasis added). Sears' website and in-store brochures state that Kenmore Dryers will "KEEP YOU CLOTHES LOOKING GREAT: An exclusive, all stainless steel drum provides lasting durability." Id. ¶52 (upper case in original; emphasis added). These allegations are of the precise type that the Seventh Circuit said would distinguish Thorogood from a claim in which common issues might predominate." (Order, 7:10-25.)

The stay on discovery is lifted and Plaintiff may commence discovery on his class claims. Currently, four discovery matters against defendants are pending with the magistrate judge. As you are aware other discovery disputes are in progress. This next stage of litigation will involve Plaintiff's counsel delving into the full extent of Defendants' alleged wrongdoing to establish not merely a likelihood to mislead, but Defendants' intentional fraudulent acts to justify the court in exercising the full extent of its equitable powers and a jury to award punitive damages against each Defendant.

With respect to the issue of relief, the risk of a substantial recovery is very probable in this case. Under California law, equitable relief is steadily evolving against the

wrongdoer under the California Unfair Competition Law (*Cal. Bus. & Prof. Code* Section 17200 et seq.). In fashioning a remedy under the unfair competition law, section 17203 does not mandate restitutionary or injunctive relief, rather it provides that the court "may make such orders or judgments . . . as may be necessary to prevent the use or employment . . . of any practice which constitutes unfair competition . . . or as may be necessary to restore to any person in interest any money or property . . . which may have been acquired by means of such unfair competition." Thus, the court has broad equitable power to create a remedy. *Cortez v. Purolator Airfiltration Products Co.* (2000) 23 Cal.4th 163, 179.

While rescission may be followed by restitution in an appropriate contract action, rescission is not a necessary predicate to granting restitution in a statutory action under the UCL. (*People ex rel. Kennedy v. Beaumont Investment, Ltd.* (2003) 111 Cal.App.4th 102, 132-33.) *Nelson v. Pearson Ford Co.* (2010) 186 Cal.App.4th 983, 1018. In the recent *Nelson* case, the California appellate court upheld the trial court's decision to award the members of the insurance class all the money they had paid for their vehicles and acquired through Pearson Ford's unfair practices as of the date of the judgment and without having the class members return their vehicles. In the instant case, this means that each of the affected Sears' customers may recover their entire purchase price, delivery and installation costs as of the date of judgment and not have to return the dryer.

Plaintiff Murray's initial disclosures set forth alternative damages calculations ranging from the premium paid for

a stainless steel drummed dryer as compared with a non-stainless steel drummed dryer to the full purchase price of the dryer plus consequential damages of delivery and installation costs. The affected Sears customers also have an interest in the profits seeking to be disgorged from both Sears and Electrolux as a restitutionary recovery under the provisions of the CLRA and/or UCL statute based upon what has been improperly received by Defendants through the sales transactions in the stream of commerce involving the subject products. These profits constitute money that once had been in the possession of these Sears customers to whom it is to be restored.

As we progress through the various significant stages of this litigation, the cost of settlement will necessarily increase. If plaintiff is successful on a motion for class certification, the court as the gate keeper will demand a more significant recovery for resolution. Finally at time of trial, Plaintiff will be seeking restitutionary relief of the full amounts of all transactional costs without offset, punitive damages based on Defendants' intentional deception and injunctive relief reenforcing the terms of the FTC Order against Sears and extending the terms of the FTC Order against Electrolux.

At our first appearance in court, Judge Wilken was surprised that Defendants have not already conceded that the drum front for the products was not made of stainless steel. There can be no vindication for Defendants in this case, only damage control. At this point, we may want to consider whether an appropriate olive branch for resolution can be mutually created on a class wide basis commensurate with the status of the case. If interested,

please pick up the telephone and call me. In the meantime, Plaintiff will continue to diligently and timely prosecute this case to an appropriate result, and expect your timely cooperation.

Thank you in advance for your consideration of this matter. I trust that good business judgment will prevail by all parties.

Sincerely,

Mark B.

11-2-10

APPENDIX B — TRANSCRIPT OF PROCEEDINGS IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED MAY 18, 2010

[1] UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STEVEN J. THOROGOOD,

Plaintiff,

vs.

SEARS ROEBUCK AND CO.,

Defendant.

No. 06 C 1999

Chicago, Illinois
May 18, 2010
9:00 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS -
RULING BEFORE THE HONORABLE
HARRY D. LEINENWEBER

* * *

[2] THE CLERK: 06 C 1999, Thorogood versus Sears.

MR. OLISS: Good morning, your Honor. Phil Oliss for the defendant, Sears.

MR. KRISLOV: Good morning, your Honor. Clint Krislov with Amy Keller on behalf of the plaintiff.

MS. KELLER: Good morning.

THE COURT: All right.

Defendant Sears moves to permanently enjoin members of this case's decertified class, and their lawyers, from seeking to certify a class in any other court based on the same allegations made in this case.

Thorogood filed a class action suit alleging that Sears misled its customers with statements that its clothes dryers contained a stainless steel drum. The 7th Circuit ordered decertification of the 29 jurisdiction class formed in the suit. After this order, *Murray*, an unnamed class member, filed a new suit against Sears in California. The *Murray* suit has similar claims and the same plaintiff's counsel as the present suit, but the new suit seeks to certify only a class of California purchasers. With the present motion, Sears wants to limit the *Murray* suit and any similar suits by asking this Court to enjoin the former class members and their lawyers from seeking class certification.

The All Writs Act permits Federal Courts to "issue all writs necessary or appropriate in aid of their respective [3] jurisdictions." 28 USC Section 1651(a). These writs can be used to "effectuate and prevent the frustration of orders" a

court "has previously issued in its exercise of jurisdiction." See *United States versus New York Telephone Company*, 434 U.S. 159.

The threshold question in this case is whether permitting the *Murray* court to consider certification of a California-only class would frustrate the Court's national class decertification. The 7th Circuit addressed this application of the All Writs Act in *Bridgestone*, 333 F.3d 763. In that case, the 7th Circuit decertified a national class because the laws of each jurisdiction varied too greatly to form one national class.

After this decision, new suits were filed in multiple jurisdictions, with some claiming a national class and others claiming a single state class. In reviewing whether an injunction was appropriate to protect its decertification order, the 7th Circuit noted that "the only classes that had been certified had national scope, and the only judgment that could be protected or effectuated is one concerning such classes."

In the present case, this Court's judgment concerned only a national class. The *Murray* case concerns only a single state class. This Court need not protect or effectuate its order with an injunction because its order is not being [4] challenged by the *Murray* litigation or any other litigation. The All Writs Act does not provide original jurisdiction to the Court, *Syngenta versus Henson*, 537 U.S. 28, or enlarge a Court's jurisdiction, *Clinton versus Goldsmith*, 526 U.S. 529. This Court's jurisdiction under the All Writs Act is limited to the case and controversy

of the original case, which was a suit based on a national class. *Murray* applies California law to a California-only class.

Additionally, this case shares few features with other cases in which an injunction was found to be necessary or appropriate under the All Writs Act. The threat of onerous litigation is limited as only one other case has been filed, unlike the numerous other filings in *Bridgestone*. This Court does not need to retain sole jurisdiction over a settlement because none was reached in this case, unlike *In Re: VMS Securities*, 103 F.3d 1317. There is no ongoing litigation in this case which must be protected from parallel litigation in another case as occurred in *Hoffman versus American Express*, 264 Federal Rules Decision 438. Injunctive relief under the All Writs Act is to be used sparingly and only in exigent circumstances. See *Brown versus Gilmore*, 533 U.S. 1301. Such circumstances do not exist in this case.

Defendant suggests that an injunction is nonetheless appropriate because the 7th Circuit based its order on the lack of common issues of law or fact. This reasoning would [5] apply with equal force to a single state class. This focus on the reasoning of the judgment aligns more closely with defendant's second argument that collateral estoppel bars the *Murray* case because the issue of class commonality has been fully litigated to a final judgment. Collateral estoppel is a defense to be pled in a subsequent lawsuit. See *Curry versus City of Syracuse*, 316 F.3d 324. Therefore, the collateral estoppel is for the *Murray* Court to decide, not this Court. See *Royal Insurance versus Zygo*, 212 Federal Rules Decision 444.

Appendix B

The availability of a collateral estoppel defense is a further reason to refuse an injunction. "The All Writs Act invests a Court with a power essentially equitable and, as such, not generally available to provide alternatives to other, adequate remedies at law." *Goldsmith*, 526 U.S. 537. Collateral estoppel is an adequate remedy in this case, and so an injunction is not appropriate or necessary.

Defendant has not demonstrated a sufficient threat to this Court's judgment such that an injunction is appropriate or necessary.

For the reasons stated, the defendant's motion is denied.

MR. KRISLOV: Thank you, your Honor.

MS. KELLER: Thank you.

THE COURT: All right.

[6] MR. KRISLOV: Is that going to be part of the minute order?

THE COURT: It is part of the record, and so if you wish, you can have it written up.

MR. KRISLOV: You bet we will.

Thank you.

(Proceedings concluded.)

* * * *

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED DECEMBER 2, 2010

THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Before

RICHARD A. POSNER, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

TERENCE T. EVANS, *Circuit Judge*

No. 10–2407

STEVEN J. THOROGOOD, individually and
on behalf of all others similarly situated,

Plaintiff-Appellee,

v.

SEARS, ROEBUCK AND COMPANY,

Defendant Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

No. 06 C 1999

Harry D. Leinenweber, *Judge.*

ORDER

Appendix C

The plaintiff-appellee filed a petition for panel rehearing, and rehearing en banc, on November 16, 2010. All the judges on the panel have voted to deny the petition, and no judge has requested a vote on rehearing the case en banc. But in view of the accusations leveled in the petition by the plaintiff's lawyer, Clinton A. Krislov, against the panel's decision, we have decided that a further statement, beyond merely reporting the denial of the petition, would be helpful to readers of the panel opinion (2010 WL 4286367, Nov. 2, 2010; our earlier opinions in this protracted litigation are reported at 547 F.3d 742 and 595 F.3d 759), readers of the petition for rehearing—and perhaps even Mr. Krislov, whose accusations are over the top, as we shall now explain, and who may wish to moderate his fury.

The petition expresses in tones of outrage (1) disagreement with the merits of our decision, including the scope of the injunction that we ordered the district court to enter; and (2) outrage at the panel's characterization of Krislov's and Boling's litigation tactics. Mark Boling is Krislov's cocounsel in the California copycat class action suit that we ordered enjoined on the authority of the All Writs Act. Krislov is the colorful attorney (and Illinois politician[1]) who in the oral argument of the first appeal

1. As he explains in the petition, ""While it may be that some number of attorneys who bring class actions seek merely to fatten their pockets at the expense of their clients, counsel herein cannot be counted among them. Since 1983—over the course of almost *forty years* [actually just 27 years]—Plaintiff's counsel has taken on tough battles against difficult defendants on difficult issues in class, derivative, and public interest cases.... Moreover, I have

in this lawsuit about alleged rust stains in clothes dryers sold by Sears Roebuck asked us to quiz our wives as to whether they worry that a "stainless steel" clothes dryer might cause rust stains on the clothes being dried unless the dryer's drum was made *entirely* of stainless steel. The wives unanimously answered "no." Given Krislov's challenge (ask your wives), that should have ended this litigation. (And speaking of gender, we note Krislov's remark at the oral argument: "Not to be sexist, your honor, but maybe we should have this en banc so some of the female judges on this court could sit and might weigh in." This may be an unacknowledged ground on which he is seeking not only panel rehearing but rehearing en banc.)

The petition notes a tension between our injunction (against the California class action), and our similar injunction in *In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation*, 333 F.3d 763 (7th Cir. 2003), on the one hand, and the Supreme Court's decisions in *Taylor v. Sturgell*, 553 U.S. 880 (2008), and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), on the other hand. But its failure to acknowledge the grant of certiorari in *Smith v. Bayer*, 131 S. Ct. 61 (2010) (discussed in our opinion), is telling: the holdings in the cases that Krislov

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run for public office, always, on platforms that challenged the status quo in our state, and when I have succeeded financially, I have used that for the public good as well.... In 2009, I founded and funded the Center for Open Government law clinic at IIT Chicago-Kent College of Law, which uniquely assists individuals in gaining access to their government, generally under the Freedom of Information and Open Meetings Acts, where currently six cases are proceeding" (emphasis in original).

cites do not rise to the level of a "clear directive" from the Supreme Court. Instead a circuit split has developed concerning whether and when class certification orders can serve as the basis for collateral estoppel in other forums. Our opinion notes this tension and the possibility that the merits decision in *Smith v. Bayer*, when it is issued, may warrant modification of the injunction that we have ordered.

The petition ignores the principal reasons our opinion gave for enjoining the copycat class action. It says virtually nothing about the All Writs Act, though that was the very ground of our decision, and makes a number of disingenuous statements such as that "rather than seeking interlocutory review in the Ninth Circuit, Sears filed an All Writs Act, 28 U.S.C. § 1651 ('All Writs Act') petition in the closed *Thorogood* case in the Northern District of Illinois seeking to enjoin the previous unnoticed class members from bringing class claims elsewhere." Sears *could not* appeal the California court's order because it was not an appealable order.

The petition ignores our point that class certification is improper given the nature of the rust-stains claim, which does not present "common issues of law or fact" that can support a class action. It ignores our point that Murray's suit is indeed a copycat. It ignores our criticisms of the two district court opinions. It says that "the Panel...ordered the district judge to enjoin class members from pursuing causes as a class action against Sears, anywhere," yet ignores that the opinion is explicit that *individual* claims are not to be enjoined. Even class actions "against Sears,

anywhere" are permitted, provided they are not based on theories rejected in our decision. And it ignores that the pressures on Sears to settle in the face of Krislov's onslaught of litigation amounts to irreparable harm; we explained that "there is no way in which Sears can recoup the expense of responding to Murray's extravagant discovery requests and of filing preclusion defenses against duplicative class actions in other states. The harm it faces from the denial of the injunction is irreparable and its remedy at law against settlement extortion nonexistent."

The petition states, without substantiation, that "this case was brought by a highly educated metallurgic engineer, Steven Thorogood ('Thorogood'), who carefully evaluated his claims against Sears before taking action." Even if this is true, there is no suggestion that Murray, the named plaintiff in the copycat action, has any relevant background that might have helped him to "carefully evaluate his claims against Sears before taking action."

The focus of Krislov's concern is language in our opinion that he regards as ad hominem. He insists that "the tone and rampant mischaracterizations of the opinion must be modified even if the conclusion remains, because the opinion unjustifiably portrays the case as meritless, lawyer-driven litigation, an accusation thoroughly belied by the record and the distinguished careers of the lawyers involved.... [T]he merits of the claims, the suitability of certifying the case as a class action and the refusal to enjoin plaintiff's California-only state class action have been legitimized by two independent federal district

courts. Thus, to disparage the merits or professional motivations of the parties or their counsel [i.e., Krislov and Boling] is unjustified and must be corrected because it runs afoul of the Code of Conduct for United States Judges." His specific concern is with the phrases "settlement extortion," "near-frivolous," "pugnacious," "pertinacious to a fault," and "a nuisance" that appear in the opinion. He ignores the evidence and analysis that supports these characterizations, and similar characterizations by other judges, and commentators, concerned with class actions that are believed to be abusive. He ignores the right and indeed the duty of judges to criticize lawyers who try the patience of other members of the bar, and the courts.

Krislov criticizes what he calls "the Panel's choice to personally attack Plaintiff's counsel [himself], in lieu of recognizing the sound discretion of *two* federal district courts" (emphasis in original). The opinion explains that the district judge in Illinois, whose decision we were reviewing, appeared to have overlooking several relevant considerations: "He seems to have believed that pleading res judicata or collateral estoppel *always* provides adequate relief against vexatious litigation. This case shows that it does not, as do the similar cases we cited earlier and the cases that say that enjoining vexatious litigation is preferable to the harassment of an expensive, time-consuming procedure to prove [a defendant's] res judicata or estoppel claims in another court." And the district judge in California—whose ruling, to repeat, cannot be appealed, even though, if it stands, it forces Sears to engage in costly discovery, as emphasized by Boling in urging a settlement favorable to the class—was confused about the record, as our opinion explains.

Appendix C

Krislov says that "Sears' resort to this Circuit for the preclusive shot is transparent forum shopping, looking for this Court's derisory view of the claim to influence it into binding all class members nationwide, because the Ninth Circuit's standards are decidedly more favorable to plaintiffs' claims." This is what is known as *chutzpah*, since Krislov brought his copycat suit in California because, as he says unguardedly, "the Ninth Circuit's standards are decidedly more favorable to plaintiffs claims." Sears was not engaged in forum shopping. Only one forum offered the possibility of relief. Because it could not appeal the interlocutory order of the California judge, the only place to go to seek relief against being sued all over the country on frivolous grounds aimed at securing a settlement was the district court in Illinois.

Krislov says: "If the logic of *Rhone-Poulenc* [*In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995)] remains accurate, then Sears had an adequate remedy to seek mandamus in the Ninth Circuit, over the Northern District of California's denial of Defendants' Motion to Strike." This misses the point: the All Writs Act permits courts to issue injunctive relief to protect and effectuate their *own* judgments, so that winning parties will *not* be forced to litigate a defense of collateral estoppel (or seek mandamus orders) in every subsequent forum in which they are harassed with the same legal claim until they cry "Uncle!"

He says: "Just as the court is entitled to be treated with the respect [*sic*] by litigants and their counsel, litigants and their counsel are entitled to be treated with respect by the court." Well, he doesn't treat us with much

respect, stating in the petition for rehearing en banc that he filed after our first opinion: "the Panel's opinion reads more like a posting in its author's well-known blog (www.becker-posner-blog.com), declaring its view of class actions, mischaracterizing class counsel as being inherently corrupted by the inducement to sell out its clients' small claims for its own fees obtained through a collusive settlement.... [T]he panel opinion blatantly ignored the record evidence and substituted the authoring judge's personal economic theories and baseless factual declarations for the developed record." And in his current petition he says that "the Court's clearly prejudiced opinion presents an unsupported, op-ed style portrayal of class action attorneys that paints with a brush so broad that it demonizes all class action attorneys as *inherently* motivated to sell out their clients for small recoveries, to obtain large fees, and goes well over the top in its characterization of undersigned counsel's actions and motivation. Moreover, it appears to run afoul of Canon 3 of the Code of Conduct for United States Judges.... Indeed, the Panel's role as the self-assured Simon Cowell of the Circuits demeans not just us, but the Court as well" (emphasis in original).

(Who, you ask, is Simon Cowell? He was the cantankerous judge on "American Idol." See www.youtube.com/watch?v=a3cTEQFP3VQ (visited Dec. 1, 2010).)

Attorney Krislov says that the panel's "exceedingly facile approach disregards the highly desirable role of persuasive authority and its underlying reasoning in the American legal system.... In the real world, whichever

way the first decision goes stands as some persuasive authority for subsequent ones. Cumulatively, the decisional tide of opinions would trend toward one competing theory until one or the other was ultimately accepted as either consensus, or simply correct, or correct in that jurisdiction." Translated, this means that Krislov's strategy is to bring identical or similar suits in different jurisdictions until he wins one, then use the judgment in that suit as res judicata or collateral estoppel in the next suit, and the next, and the next, until Sears gives up. As we noted in our opinion, Krislov wanted a judgment (rather than dismissal on grounds of mootness, Sears having offered a nuisance settlement well in excess of the maximum amount of money that Thorogood's individual claim was worth) so that he could use it to block Sears from defending the next suit, which turned out to be the California suit.

"Zesting to smear the plaintiff's counsel," says Krislov, "the Panel's characterization of the letter [the reference is to cocounsel Boling's letter to Sears, which we reprinted as an appendix to our opinion] as 'settlement extortion' lacks support in the record, same as the Panel author's declaration that Mr. Boling's 'olive branch' letter sought to sell out the class.... The letter simply details that the case is going forward, discovery will likely produce more damaging evidence, which could generate greater damages, and plaintiffs are offering an 'olive branch,' exploring defendants' appetite for negotiating an agreed resolution. There is nothing implying a sellout. Instead, the letter proposes discussing a solution that would be in the best interest of both sides—precisely what counsel

are often directed to do by courts all over the country." This is a joke. Both parties know the letter is a demand for favorable settlement terms. The letter itself contradicts Krislov's claim. It declares that "discovery will likely produce more damaging evidence, which could generate greater damages.... [I]f plaintiff is successful on a motion for class certification, the court as the gate keeper will demand a more significant recovery for resolution."

Krislov is concerned with harsh language in our opinion, but overstates the case when he decries "characterization of plaintiff class action lawyers as inherently corrupt and motivated primarily to sell out the class in order to gain large fees." What we said was that the structure of class actions under Rule 23 of the federal rules gives class action lawyers an *incentive* to negotiate settlements that enrich themselves but give scant reward to class members, while at the same time the burden of responding to class plaintiffs' discovery demands gives defendants an *incentive* to agree to early settlement that may treat the class action lawyers better than the class. Class action attorneys have an "inherent motivation" to enrich themselves at the expense of the class (and with the connivance of defendants), but motivation is not a synonym for action; any actual corruption or selling out is gauged case by case. The Boling letter is some indication that the present case is such a case.

The criticisms in our opinion of the tactics employed by some class action lawyers are not criticisms made by judges alone, let alone by judges of the Seventh Circuit alone or members of this panel alone. Our opinion gave

some examples: "The defendant wants to minimize outflow of expenditures and the class counsel wants to increase inflow of attorneys' fees. Both can achieve their goals if they collude to sacrifice the interests of the class." Christopher R. Leslie, "The Significance of Silence: Collective Action Problems and Class Action Settlements," 59 *Fla. L. Rev.* 71, 79–81 (2007) (footnote omitted); see also John C. Coffee, Jr., "Litigation Governance: Taking Accountability Seriously," 110 *Colum. L. Rev.* 288, 326–27 (2010). Two of the examples were opinions by Judge Henry Friendly, the very respected Second Circuit judge: *Saylor v. Lindsley*, 456 F.2d 896, 900–01 (2d Cir. 1972); *Alleghany Corp. v. Kirby*, 333 F.2d 327, 347 (2d Cir. 1964) (dissenting opinion). We gave additional examples in our first opinion in the clothes dryer litigation: *Parker v. Time Warner Entertainment Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165–68 (3d Cir. 2001); Jeffrey W. Stempel, "Class Actions and Limited Vision," 83 *Wash. U. L.Q.* 1127, 1213–14 (2005); Bruce L. Hay & David Rosenberg, "'Sweetheart' and 'Blackmail' Settlements in Class Actions," 75 *Notre Dame L. Rev.* 1377, 1389–92 (2000); Bruce L. Hay, "Asymmetric Rewards: Why Class Actions (May) Settle for Too Little," 48 *Hastings L.J.* 479, 485–89 (1997); Susan P. Koniak & George M. Cohen, "Under Cloak of Settlement," 82 *Va. L. Rev.* 1051, 1053–57 (1996) (describing the class action as "lawyer self-dealing on a grand scale," *id.* at 1053); Jonathan R. Macey & Geoffrey P. Miller, "The Plaintiff's Attorney's Role in Class Action and Derivative Litigation," 58 *U. Chi. L. Rev.* 1, 22– 26 (1991). And the criticisms can be found in other opinions of this court. See, e.g., *Szabo v. Bridgeport Machines,*

Inc., 249 F.3d 672 (7th Cir. 2001); *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834 (7th Cir. 1999); *Vollmer v. Selden*, 350 F.3d 656, 660 (7th Cir. 2003); *In re Rhone-Poulenc Rorer, Inc.*, *supra*, 51 F.3d at 1298–99.

Want more? There is plenty more, including references in Supreme Court as well as court of appeals opinions to the danger of collusion between class action lawyers and defendants' lawyers. *Stoneridge Investment Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 163–64 (2008); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 852–53 (1999); *AmChem Products, Inc. v. Windsor*, 521 U.S. 591, 621–22 (1997); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740–41 (1975); *Sullivan v. DB Investments, Inc.*, 613 F.3d 134, 149–50 (3d Cir. 2010); *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 802 (3d Cir. 1995); *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991); *In re Agent Orange Product Liability Litigation*, 818 F.2d 216, 223–25 (2d Cir. 1987); *Piambino v. Bailey*, 757 F.2d 1112, 1139 and n. 68 (11th Cir. 1985); *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1306–07 (4th Cir. 1978); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1169 (5th Cir. 1978). There are also references to settlement extortion: *Jones Motor Co. v. Holtkamp, Liese, Beckemeier & Childress, P.C.*, 197 F.3d 1190, 1193 (7th Cir. 1999); *Byrne v. Nezhat*, 261 F.3d 1075, 1129–31 (11th Cir. 2001); *Duhaime v. John Hancock Mutual Life Ins. Co.*, 183 F.3d 1, 6–7 (1st Cir. 1999).

Neither the judges on this panel nor other federal judges so far as we are aware have denied that the class

action is a worthwhile device, and indeed is indispensable for the litigation of many meritorious claims. But like many other good things it is subject to abuse. It has been abused in the stainless steel clothes dryer litigation.

The petition for rehearing is denied. No judge of this court in regular active service having requested a vote on the petition for rehearing en banc, rehearing en banc is also denied.